91-561

No._____

_____

IN THE SUPREME COURT OF THE UNITED STATES

_____

October Term, 1991

_____

MAHINDER S. UBEROI, *Petitioner*

v.

UNIVERSITY OF COLORADO, et al.,
Respondents

_____

PETITION FOR WRIT OF CERTIORARI TO COLORADO COURT OF APPEALS

_____

MAHINDER S. UBEROI, *pro se*
819 Sixth Street
Boulder, CO 80302
(303) 442-2879

QUESTIONS PRESENTED

1. Whether 491 U.S. 58, which held that a state and its arms are not "persons" under 42 U.S.C. §1983, overrules Colorado Supreme Court mandate, 713 P.2d 894 (Colo. 1986), that University of Colorado is like a local government and therefore a "person" under §1983, following *Monell*, 436 U.S. 658, considering that by state law it functions with substantial autonomy, although carrying out state functions, and is financed largely indepently of state treasury?

2. Can agent, official or police officer of University of Colorado be sued in his personal capacity under §1983 even if the university is not a person under §1983?

3. Is the criminal statute, §18-9-109, Colorado Revised Statutes, Interference with staff, faculty and students of educational institutions, unconstitutionally broad since petitioner university professor's request, under Colorado Open Records Act, that clerical staff of University of Colorado permit inspection of university records is interference with university activities and violation of §18-9-109?

4. Was a clerk of the university acting under color of law when he committed unprivileged assault and battery in forcibly removing petitioner, university professor, from the clerical office, because, allegedly, professor was disturbing clerical workers?

5. Does University police officers' conspiracy with University officials to forcibly detain petitioner for one-half hour after completion of *Terry* investigatory stop, to resolve petitioner's request under Colorado Open Records Act, violate his constitutional rights to life, liberty, and protection against unlawful seizure?

6. Are proceedings in state trial court void because respondents obtained its jurisdiction by the fraudulent assertion that appellate court had remanded the case while it had issued

a mandate of dismissal?

7. Did state trial judge deny due process and equal protection when she called civil rights petitioner perverse and ordered him out of the courtroom because he attempted to show that she lacked jurisdiction and her judgment was plainly erroneous?

8. Was petitioner's common law claim of assault and battery revived, which was dismissed because respondent enjoyed governmental immunity, when trial court reversed itself and ruled that assault and battery was a private fight on state property?

9. Do conclusory statements that the action is frivolous and that the appeal is also frivolous, and assessment of attorney fees on that basis, violate due process and equal protection?

10. Do 42 U.S.C. §1988 and relevant case law or state law C.R.S. §13-17-101, et seq., apply to attorney fees for federal civil rights claims in state court?

11. Did state trial court deny petitioner the reasonable notice and hearing requirements of due process when respondents surprised petitioner with undocumented bill of costs and attorney fees and the court instantly approved it and instantly signed in chambers respondents' proposed order without giving petitioner an opportunity to object to its form?

12. Does Colorado Court of Appeals' custom and practice of not permitting pro se non-attorney appellant to present oral arguments deny due process and equal protection?

13. Do C.R.S. §§13-17-101 et seq., on Attorney fees, unconstitutionally deny equal protection because they allow attorney fees to respondents for filing fraudulent affidavits and pleadings and deny any compensation to petitioner *pro se* litigant for responding to such papers?

LIST OF PARTIES

MAHINDER S. UBEROI, Petitioner

v.

UNIVERSITY OF COLORADO, WILLIAM McINERNY, JOE ROY, GARY ARAI, JOHN HOLLOWAY and RICHARD THARP, Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions:

Statutes:

Rules:

Other Authority:

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

MAHINDER S. UBEROI, petitioner

v.

UNIVERSITY OF COLORADO, et al., respondents

PETITION FOR WRIT OF CERTIORARI TO COLORADO COURT OF APPEALS

The petitioner, Mahinder S. Uberoi, respectfully, prays that a writ of certiorari issue to review the judgment and opinion of Colorado Court of Appeals entered on December 7, 1989, denied rehearing on March 29, 1990. Colorado Supreme Court denied certiorari on November 19, 1990.

OPINIONS BELOW

Mandate of Colorado Supreme Court, Colorado Court of Appeal's order on rehearsing and its opinion have not been reported. They are reprinted in the appendix hereto, p. a1, infra.

The decision of District Court of Boulder County, Colorado, is reprinted in the appendix hereto, p. a5, infra.

JURISDICTION

On May 9, 1983, invoking jurisdiction under 42 U.S.C. §1983 and general jurisdiction of District Court, Boulder County, Colorado, petitioner filed a complaint against respondents for conspiracy to commit assault and battery on petitioner and

conspiracy to violate petitioner's federal civil rights. On December 19, 1983, Boulder District Court dismissed common law claims for failure to give proper notice under Colorado Governmental Immunity Act and dismissed civil rights claims against all respondents in their personal and/or official capacities since University of Colorado is not a person under §1983.

On appeal, Colorado Supreme Court reinstated civil rights claims since University of Colorado, based on its own peculiar circumstances, the state policy, and the state law governing it, is sufficiently independent of the state and may be considered a local government under *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978). See *Uberoi v. University of Colorado*, 713 P.2d 894 (Colo. 1986).

On remand, Boulder District Court granted summary judgment for all respondents since their confessed misconduct did not rise to the level of constitutional deprivations. It denied attorney fees and costs to any party by omitting any reference to them in the judgment.

Petitioner appealed to Colorado Court of Appeal which improvidently dismissed the appeal on respondents' fraudulent motion that trial court had not resolved the issue of attorney fees.

Respondents then fraudulently stated to Boulder District Court that Court of Appeals had remanded the case for the resolution of the issue of attorney fees. District Court knowingly acted without jurisdiction, rejected the standards for award of attorney fees on federal civil rights claims under 42 U.S.C. §1988, and without any basis awarded respondents their attorney fees under C.R.S. §13-17-101, et seq.

Colorado Court of Appeals affirmed summary judgment against all respondents since under *Will v. Michigan Dept. of State Police*, 491 U.S. 58, University of Colorado is not a "person" under §1983 and therefore trial court lacked subject matter jurisdiction even though petitioner had sued respondents

in their personal and official capacities and had sought prospective injunctive relief. It affirmed that state statutes apply to request for attorney fees on federal civil rights claims and affirmed the award of attorney fees to respondents.

Colorado Supreme Court denied certiorari.

Jurisdiction of this court is invoked under 28 U.S.C. §1257(a). On March 15, 1991, Justice White extended the time to file this petition to and including April 18, 1991.

STATEMENT OF THE CASE

Petitioner is a male of Asian Indian Origin, U.S. citizen, distinguished tenured professor and 3-term past chairman of Department of Aerospace Engineering at University of Colorado. *See Who's Who in America* and *Who's Who in the World*. In 1970, University President sent legal memorandum to petitioner and all other chairmen and deans that Colorado Open Records Act has been given legal interpretation by University legal Counsel and it shall be the policy of the University of Colorado to observe the requirements of this Act.

Petitioner believed that the University practiced racial discrimination and had defrauded his and other research grants from the United States government.

The case arose out of petitioner's efforts to seek inspection of public records at the University to support his belief. On first appeal, Colorado Supreme Court, *Uberoi v. University of Colorado*, 713 P.2d 894, 896-7 (Colo 1986) summarized the case:

Each of the individual defendants is an agent, officer, or employee of the University of Colorado and each is being sued in his individual capacity and as an agent acting within the scope of his duties on behalf of the university at all times material to the complaint.

The compliant arose out of events which occurred on May 12, 1982. On that date, Uberoi went to the office of the defendant William McInerny on the University of Colorado campus at Boulder, and requested records which he claimed were obtainable under Colorado Open Records Act. The records the plaintiff sought were those pertaining to the Joint Institute for Laboratory Astro Physics. McInerny and his staff did not give Uberoi immediate attention. After about fifteen minutes, Uberoi asked how long it would take before he would receive the records he had requested. A confrontation ensued during which Uberoi alleges McInerny called him names, slammed an office door against him, and repeatedly pushed him. University of Colorado Police Department Officers Roy and Arai were summoned and arrested Uberoi without probable cause. Arai grabbed Uberoi without warning. Uberoi informed Arai that he was a professor at the university and that his purpose in visiting McInerny's office was lawful. Arai kept Uberoi in custody without any purpose or probable cause for approximately one-half hour.

Uberoi later learned that, while the incident was in progress, Roy and McInerny had telephone conversations with the defendant John Holloway, an attorney for the university. During these conversations, these defendants conspired to keep Uberoi confined without probable cause and to obtain statements prejudicial to Uberoi from McInerny's staff. The defendants Roy, Arai, McInerny, and Holloway conspired, maliciously and without probable cause, to cite Uberoi for violating §18-9-109, 8 C.R.S. (1978), intentional interference with university activities. On information and belief, Uberoi claims that the defendants Holloway and Richard Tharp, another attorney for the university, "are engaged in a continuing conspiracy to frame into unlawful acts plaintiff's lawful requests for inspection of public records."

Uberoi's complaint at issue here sets forth eleven claims for relief. In his first claim, Uberoi states that McInerny slandered him. His second claim is against McInerny and pleads the tort of assault. The third claim, also against McInerny, alleges the

tort of battery. In his fourth claim, Uberoi asserts that Arai assaulted him. The fifth claim alleges the tort of battery against Arai. Officers Arai and Roy are charged with false arrest in Uberoi's sixth claim. The seventh claim for relief alleges that the defendants deprived Uberoi of his rights, privileges, and immunities secured to him by the first, fourth, fifth, ninth, tenth, and fourteenth amendments to the United States Constitution, the Constitution of the State of Colorado, and 42 U.S.C. §1983. The eighth claim generally alleges that the university was negligent in selecting, appointing, training, supervising, and/or retaining the individual defendants. That claim incorporates by reference the seventh claim and requirements of the Open Records Act. Uberoi also asserts that the defendants were negligent when they failed to ascertain that he was not involved in any unlawful activity, negligent in the manner in which he was arrested, and negligent in using inappropriate force during the arrest. The tenth claim for relief states that the defendants have conspired to deprive him of his constitutional rights. Finally, in his eleventh claim for relief, Uberoi alleges the defendants' conduct deprived him of due process of law under the fourteenth amendment to the United States Constitution. The last two claims also incorporate by reference the seventh claim for relief.

COLORADO SUPREME COURT MANDATE ON FIRST APPEAL, 713 P.2d 894

It affirmed trial court's dismissal of common law claims I through VI and VIII for plaintiff's failure to give proper notice under Colorado Governmental Immunity Act. It reversed trial court and held that University is sufficiently independent of the state to be considered a local governmental entity and under *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658 (1978) it is a "person" under 42 U.S.C. §1983 and reinstated civil rights claims VII, IX,X, and XI;, but only to extent that IX alleges violations other than negligent violation of due process under XIV Amend.

TRIAL COURT PROCEEDINGS ON REMAND

Respondents filed affidavits and moved for summary judgment in their favor on petitioner's civil rights claims against them. Petitioner filed his affidavit and moved for partial summary judgment in his favor based on respondents' own affidavits.

RESPONDENT McINERNY'S CONFESSED UNPRIVILEGED ASSAULT AND BATTERY UPON PETITIONER

Respondent McInerny, a clerk at the University, confessed that he committed unprivileged assault and battery upon petitioner University professor in the process of forcibly removing the professor from the office where some clerks work because the professor was disturbing them.

> I put my hand on his chest in order to move him back from the doorway, and I attempted to close the door at the same time... . I did not push Uberoi hard enough to hurt him... [McInerny's affidavit.]

McInerny in his brief argued that:

> Plaintiff's claims against McInerny for assault and battery are obviously common-law tort claims. The facts do not reflect that McInerny abused any governmental power in his dealing with plaintiff...and is therefore not actionable under §1983. Plaintiff's remedy, if any, lies in state court under common law.

McInerny clearly engaged in fraud and deception. He first claimed that he was acting during the course of his duties and common law claims against him should be dismissed for petitioner's failure to give proper notice under Colorado Governmental Immunity Act. Trial court dismissed all common law claims against him, and Colorado Supreme Court affirmed. Now he claimed that he acted in private capacity to assault and batter petitioner and therefore summary judgment should be

granted in his favor on claims against him under §1983 for his confessed assault and battery upon petitioner.

Petitioner cited *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974) which held that a justice of peace who committed an unprivileged assault and battery upon a person in the process of removing him from his courtroom was acting under the "color of law" and a complaint based on such conduct sufficiently states a claim cognizable under 42 U.S.C. §1983.

Petitioner moved for partial summary judgment in his favor since McInerny had confessed to assault and battery and that the degree of brutality be left to the jury since petitioner averred much more brutal attack on him than McInerny had confessed.

Trial court entered summary judgment for McInerny on assault and battery claims under §1983 since he did not abuse any governmental power but *refused to revive the common law claims of assault and battery.*

RESPONDENTS CONFESSED THEY ACTED IN CONCERT TO FORCIBLY DETAIN PETITIONER FOR 1/2 HOUR AFTER THE INVESTIGATORY (*TERRY*) STOP

Affidavit of University of Colorado police officer, Roy, *inter alia*, stated:

> I then asked Uberoi to wait in the reception area with [police] officer Arai while I and McInerny called University Counsel [respondent Holloway] about the records request.

Affidavit of University of Colorado police officer Arai, *inter alia*, stated:

> At one point Uberoi started for the door to leave the floor we were on and I took him by the arm and led him over to a chair and again told him to sit down and wait for detective Roy to return. I did not use excessive force.

Respondents moved for summary judgment in their favor because University police acted reasonably and did not use such excessive force as to "shock the conscience" citing *Rochin v. California*, 342 U.S. 165 (1952).

Petitioner moved for summary judgment in his favor because respondents' own affidavits are confession that they conspired to violate petitioner's constitutional and statutory rights.

After committing unprivileged assault and battery upon petitioner, McInerny called University police claiming petitioner was disturbing his office. University police officers Roy and Arai arrived in a couple of minutes. Petitioner explained to them that he was a professor at the university and that he was in that office area to request inspection of university records which are open to public at reasonable hours. After completion of the investigation, officer Roy placed petitioner in officer Arai's custody while petitioner objected that there was no reason to further detain him.

McInerny called police to investigate petitioner's alleged disturbance of his office, but *not to help him and Holloway in preparing a response to petitioner's request for public records.*

An investigative detention must be temporary and last no longer than necessary to effectuate the purpose of the stop. *Florida v. Royer*, 460 U.S. 491, 500 (1983). *Terry v. Ohio*, 392 U.S. 1,20 (1968). *U.S. v. Sharpe*, 470 U.S. 675, 686 (1985).

Any amount of force to detain a person after the completion of investigative stop is unprivileged assault and battery and violates victim's civil rights.

RESPONDENTS CONFESSED UNIVERSITY OF COLORADO'S POLICY AND CUSTOM ARE UNCONSTITUTIONAL

University police officer Roy's affidavit, inter alia states:

> It appeared to me that Uberoi had stated what his business was, McInerny had requested that he leave the office and wait for a reply to his request, and Uberoi had refused to do so causing disruption to McInerny's office and staff. These facts met the elements of the statute prohibiting interference with the faculty or staff of a University office. I then advised Uberoi that his conduct violated the statute prohibiting interference with staff or faculty of the University, C.R.S. §18-9-109.

Plaintiff avers that he did not refuse to leave the office, and did not cause any disturbance. In any case, §18-9-109(3) is only violated if a person willfully refuses to leave after being told to do so by *chief officer of the institution, his designee or a dean.* Plaintiff is a professor and McInerny is a clerk. As used by and interpreted by the University, its police, chancellor and legal counsel, any of the thousand of its agents, employees, students, and faculty may call the police and have another member of the University community cited for violation of the statute, because the member's failure to leave a particular area of the University constituted interference with University activities. The statute is unconstitutionally broad, and respondents use it to harass racial minorities at the University.

Clearly, the University cannot be a marketplace for ideas since a minor disagreement may be a violation of the criminal statute C.R.S. §18-9-109.

University counsel, Holloway and/or Tharp, conspired with McInerny, Roy, and Arai to enforce against plaintiff University's racially motivated unlawful policy on §18-9-109(3) prior to and during the 1/2 hour conversation with Roy and McInerny on May 12, 1982, which led to violation of plaintiff's civil rights and they are civilly liable.

Trial court denied petitioner's motion for summary judgment, instead it granted respondents' motion for summary judgment since the conduct of police officers was reasonable and they did not use excessive force.

Petitioner moved for reconsideration of the clearly erroneous summary judgment. Trial Court ruled:

> As a motion for reconsideration may be allowed at the discretion of the court because no such motion exists under the rules, the court denies the Plaintiff the privilege to file a motion for reconsideration [of the summary judgment]. Accordingly, the motion for extension of time is denied.

RESPONDENTS' FRAUDULENT MOTIONS IN COLORADO SUPREME COURT AND COLORADO COURT OF APPEAL

In their answer, respondents pleaded attorney fees under C.R.S. §§13-17-101 et seq., alleging that petitioner's suit was frivolous. On October 8, 1987, trial court denied respondents their costs, including attorney fees, by omitting any reference to them in the judgment. They did not move to alter or amend the judgment within the 15-days jurisdictional period, Rule 59.

> As determined by the court entering the judgment, the omission of an order relating to costs constitutes a direction by it that no costs, including attorney fees, are allowed... . Under the circumstances, the trial court had no jurisdiction to hear much less grant these motions. *Wesson v. Johnson*, 622 P.2d 104-05 (Colo. App. 1980).

On November 24, 1987, Uberoi filed notice of appeal in Colorado Supreme Court. On December 2, 1987, respondents moved to dismiss, fraudulently stating that trial court had not resolved the issue of attorney fees and judgment was not final. The case was transferred to Court of Appeals where respondents made the same fraudulent motion, which was improvidently granted on February 2, 1988.

RESPONDENTS' FRAUDULENT MOTION IN TRIAL COURT

On February 12, 1988, respondents fraudulently moved the trial court that:

> The Court of Appeals has remanded the case for a determination of the issue of attorney's fees.

The Court did not issue the mandate until March 30, 1988, which did not remand the case, but improvidently dismissed the appeal.

> Willful abuse of legal process, such as institution or procuring the institution of, unauthorized or fictitious proceedings or suit, willful relitigation of matters previously adjudicated...or obtaining court orders by fraud or deceit...is contempt...[Citations omitted 17 C.J.S. Contempt, §10, p. 22.]

TRIAL COURT PROCEEDINGS IN CLEAR ABSENCE OF ALL JURISDICTION

It was mandatory for trial court to cite respondents for numerous contempts and apply sanctions. Instead, it knowingly proceeded without jurisdiction. From February 12, 1988, trial court's proceedings without jurisdiction cover ten volumes of thousand of pages of record, as summarized below.

FRAUDULENT AFFIDAVITS FOR ATTORNEY FEES AND COSTS

Respondents submitted un-itemized affidavit of attorney fees for $13,493.00. Plaintiff demanded an itemized bill of costs. They responded with an additional affidavit of un-itemized fees for $3,074.50. At the hearing, they submitted affidavit for fees of $29,042.90 and costs of $4,592.23. Plaintiff objected on grounds of surprise. Trial court overruled and granted the entire request. It asked counsel to prepare an order which it signed immediately upon receiving it without giving plaintiff an opportunity to object to its form. This violated C.R.S. §§121-1-16 and 22. Plaintiff's subsequent examination showed

that the affidavit contained numerous fraudulent items and attorney fees and costs in Colorado Supreme Court and Colorado Court of Appeals while these appellate courts had never awarded any fees or costs.

Addition of itemized attorney fees from March 6, 1986 to November 19, 1987 gives $20,047.90 which is almost twice the first un-itemized affidavit of $13,493.00 for the same period. Therefore, one of the affidavits is fraudulent. Trial court denied plaintiff's repeated motions to compel respondents to file, original, clear, meticulous, itemized contemporaneous time and expense records as kept by counsel and as billed to respondents and their insurers which were used to prepare the affidavits, in accordance with the requirements of *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983). They did confess to one fraudulent item:

> Defendants confess that inclusion [in the affidavit] of the cost of February 18, 1987, deposition was an error. [Uberoi was never deposed.]

FRAUDULENT COMMENCEMENT OF NEW ACTION UNDER THE CASE NO. OF THIS ACTION FOR WHICH FINAL JUDGMENT HAD BEEN ENTERED

On April 24, 1988, plaintiff was served summons and a new complaint entitled *University of Colorado Board of Regents v. Mahinder S. Uberoi which* carried the old case No. 85 CV 625-5. It sought to enjoin Uberoi from appearing pro se in any pending or future action in XX Judicial District of Colorado.

On May 5, 1988, plaintiff moved to quash all proceedings held in clear absence of all jurisdiction since February 12, 1988, including those for attorney fees and to quash summons and service of new complaint.

At the hearing on June 1, 1988, it denied the motion and enjoined plaintiff. He attempted to enter objection that summary judgment, in particular on claims of assault and battery, award

of attorney fees and costs and the injunction are unjustified since respondents have confessed to assault and battery and conspiracy to violate his civil rights.

THE COURT: Mr. Uberoi, you're only proving the merits of my order and I refuse to listen to any more from you—

MR. UBEROI: All right.

THE COURT: The fact that after I issued an injunction you can stand up and start talking about the facts of the initial assault indicates to me that when I said you were persistent and perverse, I was underestimating you and I refuse to listen to you any more about this case. And I appreciate your leaving at this time.

The Court later entered a written order:

The Clerk of the Court is directed not to accept any further documents, pleadings, or other paper work from Mr. Uberoi in this case until further order of the court.

The injunction prevented plaintiff from filing an appeal bond and from filing a response to respondents' oppressive interrogatories under Rule 69(d). Trial court then fined plaintiff $1,031.25 for not filing a response to the interrogatories.

Parties understood the plain language of the injunction that it prohibited plaintiff from filing any papers, although he believed that he could and did file designation of record on appeal, which is a part of appellate process over which trial court has no jurisdiction. Respondents moved to *put plaintiff in prison for 6 months for filing the designation.*

Petitioner moved that under 42 U.S.C. §1988, C.R.S. §§13-17-101 et seq., or inherent powers of the court, he be compensated for responding to fraudulent and frivolous pleadings

of respondents. The court denied the motion because petitioner is not an attorney and not entitled to any fees.

PROCEEDINGS IN COLORADO COURT OF APPEAL

The following were some of the issues raised on appeal.

1. Whether claims for assault and battery against respondent, McInerny, which were dismissed for petitioner's failure to give proper notice under Colo. Governmental Immunity Act, were automatically revived, when, on remand, trial court dismissed civil rights claims based on the same conduct because McInerny was acting as a private citizen?

2. Was petitioner denied due process and equal protection when trial court ordered him out of the courtroom as he attempted to enter objection to the clearly erroneous decision on assault and battery claims?

3. Should trial court have entered summary judgment for petitioner on his claims of assault and battery on McInerny's confession and on claims of conspiracy to violate his civil rights when respondents confessed that he was forcibly detained for 1/2 hour after completion of investigatory (*Terry*) stop by police while they conferred among themselves by telephone and in private about matters unrelated to the reason police were called?

4. Did University of Colorado have custom, policy, regulations and use C.R.S. §18-9-109, interference with University activities, to cast lawful movement and enquiry of petitioner University professor and other minorities at the University, into unlawful acts, violate their civil rights, and is the statute unconstitutionally broad?

5. Was reasonable discovery prohibited by trial court and summary judgment entered for respondents when material facts were in dispute?

6. Did trial court have jurisdiction to reconsider, four months later, its denial of attorney fees and costs when respondents fraudulently stated that Court of Appeals had remanded the case, and to award costs and attorney fees for proceedings in Supreme Court and Court of Appeals?

7. Was there any basis in fact and under Colorado or federal civil rights law for award of attorney fees?

8. Did trial court violate C.R.S. §§121-1-16 and 22 when it instantly approved Bill of Costs and signed the proposed order without giving petitioner fifteen days in which to object to undocumented and fraudulent items in the Bill and object to the form of the order?

9. Did respondent submit fraudulent pleadings and affidavits for attorney fees and costs?

10. Whether C.R.S. §13-17-101 et seq., and C.R.C.P. 11 as interpreted by trial court are unconstitutional since they allow attorney fees to respondents for filing fraudulent pleadings and affidavits and deny any compensation to *pro se* petitioner for respondings to such papers?

11. Did trial court have jurisdiction to hear a new complaint, as an integral part of this action for which final judgment had been entered, to permanently enjoin petitioner from appearing *pro se* in XX Judicial District?

12. Did respondents violate petitioner's civil rights when they moved trial court to *put him in jail for six months* because he filed designation of record on appeal which allegedly violated the injunction issued after the final judgment that petitioner is permanently enjoined from appearing *pro se* in any manner in this action?

13. Whether findings of frivolous claims unsupported by the record are evidence of personal bias and prejudice of court

below?

14. Whether trial court denied due process and equal protection when it ruled that motion to reconsider does not exist in the rules and therefore denied plaintiff the privilege?

After the briefs were closed, respondents cited *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) which held that a state is not a "person" under §1983. They alleged that it overrules *Uberoi v. University of Colorado*, 713 P.2d 894 (Colo. 1986) which held that University of Colorado is sufficiently independent of the state and like a local government, under Monell, *supra*, p. 5, it is a "person" under §1983. Court of Appeals citing *Will* ruled:

> Accordingly, although the trial court provided different reasons for its second dismissal of the complaint, we affirm the dismissal on the ground that it lacked subject matter jurisdiction. [Ct. of Appeal, p. a2.

It should be noted that trial court did not dismiss the action on remand but entered summary judgment for respondents. Court of Appeal further ruled that it disagrees with petitioner that trial court's award of attorney fees was unauthorized, unjustified, excessive and undocumented. It refused to consider the issues on appeal, since they were "totally without merit." It ended with the conclusory statement that the appeal is frivolous.

The court denied rehearing on March 29, 1990. Colorado Supreme Court denied petition for certiorari on November 19, 1990.

REASONS FOR GRANTING THE WRIT

I.

Under state law, University of Colorado is sufficiently independent of the state to be considered a local government and therefore a "person" under §1983, following *Monell*, 436 U.S. 658.

Colorado Supreme Court in *Uberoi v. University of Colorado*, 713 P.2d 894, 900 (1986) held that:

> Of principal import to this issue [whether University of Colorado is a "person" under §1983] is the Court's decision in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). The Court held there that local governing bodies can be sued directly under §1983 for monetary, declaratory and injunctive relief.... Even though *Monell* did not specifically address the question of whether a state university is a "person" under §1983, its reasoning logically requires us to conclude that a state university is a person within the meaning of §1983.

713 P.2d 894 never held that a state is a "person" under §1983. Therefore, *Will* is irrelevant here. *Monell* has not been overruled. Universities exist in a unique governmental context and each must be considered on the basis of its own peculiar circumstances, state law and public policy governing it in order to determine whether it, its board of regents or other officials and agents are "person" under §1983.

In Respondents' own words:

> The tests for whether a governmental entity is an arm of the State, as distinguished from so-called political subdivisions such as counties, municipalities and other "local governing bodies," are: (1) to what extent does the entity, although carrying out a state mission, functions with substantial autonomy from the state government, and (2) to what extent is the entity financed independent of state treasury. See *Unified School District No. 480 v. Epperson*, 583 F.2d 118, 1121-22 (10th Cir. 1978).

University of Colorado functions with substantial autonomy, although carrying out a state function

Board of Regents of the University of Colorado is elected by the people and neither Governor nor any State official is a

member. Board has:

> [G]eneral supervision...and the exclusive control and direction of all funds and appropriations... unless otherwise provided by law. Colo. Const. Art. VII §5(2).

C.R.S. §§23-20-101 et seq., and other statutes reinforce this independence. State provides the Board with a single line item appropriation which may be used in a manner deemed most appropriate by the Board, C.R.S. §23-1-101(1)(a), and the Board is authorized to retain all monies appropriated to it under this section, or otherwise generated, from fiscal year to fiscal year. Subsection (3).

Furthermore, C.R.S. §24-75-104 mandates that gifts and endowments made to the Board belong to it, and neither principal nor interest of such gifts will be used to reduce state appropriations and both principal and interest shall be in addition to state appropriations.

The school districts in Colorado in 1989 received 45.6% of revenues from the state, C.R.S. §22-53-114(b)I, which is more than twice, by percentage, the amount given the University. Furthermore, the state has placed limitations on the use of state appropriations by school districts, e.g., state appropriations may not be used to buy land, buy or build structures or to alter or improve existing structures if the cost exceeds five thousand dollars. They are considered "person" under §1983.

On the other hand, the Board may use state appropriations "in any manner deemed most appropriate...by board." C.R.S. §23-1-104(1)(a).

University of Colorado Annual Financial Report, 1988-89, at 5 notes that total lack of state control on expenditure of state appropriations and other monies generated by it has enabled it, inter alia, to:

> establish reserves for building and equipment maintenance

and replacement...reallocate funds and accumulate and carry forward reserves necessary to finance the University's programs and legal obligations.

Thus, the statutes governing the University give it more financial independence from the state than local school districts.

University of Colorado is financed largely independently of state treasury

We have already canvassed that state law provides great autonomy to the University for its operation and financial management. University of Colorado, Annual Report for 1988-89 at 4 shows that it received only 22.9% of its revenue from state appropriations.

The University is the sole beneficiary of the University of Colorado Foundation, Inc., which has assets of hundreds of millions of dollars and generates income for it. It is the sole owner of the University Improvement Corporation which has large real estate assets. In litigation with petitioner in state court, it has claimed that these corporations are private and not subject to state law such as Colorado Open Records Law.

In addition, the University annually received large amounts of funds and assets as gifts.

Thus, it has more than enough resources of its own, independent of state appropriations, to satisfy any judgment for damages which may result from this action. The answer to the question of whether any judgment would be satisfied from state treasury has been considered the most important in determining Eleventh Amendment Immunity. *See Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

U.S. Supreme Court has not overruled Colorado Supreme Court's opinion that University of Colorado is like a local government

Will at n.3 cited *Uberoi v. University of Colorado*, 713 P.2d

894 (Colo. 1986) and several other cases where it claimed that courts have ruled that a state is a "person" under §1983. However, 713 P.2d 894 never held that state of Colorado is a "person" but that the University of Colorado is like a local government and therefore a "person" under §1983, following Monell.

Therefore, the court's inclusion of 713 P.2d 894 in *Will*, n.3 is an inadvertent plain error but not an opinion which overrules the opinion embodied in 713 P.2d 894.

Moreover, the analysis given herein above shows that University of Colorado is not an "arm of the state" but a very independent entity aided in small measure by the state.

II.

Trial court has subject matter jurisdiction over personal-capacity claims under §1983 against officials and claim for prospective injunctive relief against University of Colorado even if it is not a "person" under §1983

Colorado Court of Appeals is clearly erroneous in its conclusory statement that under *Will*, trial court had no subject matter jurisdiction over *any* claim under §1983 against *any* of the respondents because *one* of them, University of Colorado, is not a person under §1983.

Assuming, *arguendo*, that University of Colorado is an arm of the state and under *Will* it is not subject to monetary claims under §1983, it is still subject to claims for prospective injunctive relief. *Will*, n.10. Record establishes that petitioner moved trial court for prospective injunctive relief.

The complaint alleged that each individual respondent acting under color of law violated petitioner's federal rights. Therefore each was personally liable under §1983.

> On the merits, to establish *personal* liability in a §1983 action, it is enough to show that the official acting under color of state law, caused the deprivation of a federal right. See, e.g., *Monroe v. Pope*, 365 U.S. 167(1961). More is required in an official capacity action, however, for a governmental entity is liable under §1983 only when the entity itself is a "moving force" behind the deprivation... *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). [Emphasis in the original.]
>
> With this distinction in mind, it is clear that a suit against a government official in his or her personal capacity cannot lead to imposition of...liability upon the governmental entity. Id. at 167.

Thus, *Will* does not bar personal liability suit under §1983 against government officials. The Third Circuit in *Melo v. Hafer*, 912 F.2d 628 (1990) has examined *Will* and came to the same conclusion.

In case of any doubt that individual respondents were sued personally under §1983, Colorado Court of Appeals should have asked the parties to rebrief the court in the light of *Will* which was announced after the briefs were closed. It should have permitted oral arguments, or looked up "the course of the proceedings" embodied in the record on appeal. In fact, it did not do any such thing and denied, without comment, petitioner's motion for oral agreement.

> In many cases, the complaint will not clearly specify whether officials are sued personally, in their official capacity, or both. "The course of proceedings" in such cases typically will indicate the nature of the liability sought to be imposed. *Brandon v. Holt*, 469 U.S. 464, 469 (1985). *Kentucky* at n.14.

The course of proceedings also clearly shows that individual respondents were sued personally under §1983. E.g., petitioner sought punitive damages from individual respondents which are only available when an official is sued personally under §1983.

> In addition, punitive damages are not available from a [governmental entity], but are available in a suit against an official personally, see *Smith v. Wade*, 461 U.S. 30 (1983). *Kentucky*, at n.13.

Individual respondents clearly understood that they were sued personally under §1983 since in their answer to the complaint they pleaded qualified or good faith immunity which is only available in a personal-capacity action.

> When it comes down to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as objectively reasonable reliance on existing law. See *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity); *Pierson v. Ray*, 386 U.S. 547 (1967) (same); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (qualified immunity); *Wood v. Strickland*, 420 U.S. 308 (1975) (same). In an official-capacity action these defenses are unavailable. *Owen v. City of Independence*, 445 U.S. 622 (1980); see also *Brandon v. Holt*, 469 U.S. 464 (1985). The only immunity that can be claimed in an official capacity action are form of sovereign immunity that the entity, qua entity, may possess, such as the Eleventh Amendment. While not exhaustive, this list illustrates the basic distinction between personal and official capacity actions. *Kentucky*, at 166-167.

III.

Due process guarantees civilized proceedings

It is said that decorum in a court and deference to the judge are not for the personal dignity of the judge but for orderly progress of the adversary proceeding which also requires that parties be treated in a civilized manner.

Respondents moved for attorney fees alleging that petitioner's claims were frivolous. At the hearing, Petitioner

attempted to submit to state trial judge, Roxanne Bailin, that summary judgment for respondents was clearly erroneous since they had confessed to their actionable conduct. Award of attorney fees to them would compound the plain error. Whereupon, she fulminated:

> When I said you were persistent and perverse, I was underestimating you, and I refuse to listen to you any more about this case. And I appreciate your leaving at this time.

Judge Bailin denied due process by refusing to listen to petitioner's entirely reasonable arguments, and she did it in an uncivilized manner. The court in *McNabb v. United States*, 318 U.S. 332 (1943), held that courts have the duty of "establishing and maintaining civilized standards of procedures." id at 30. It goes without saying that a judge should conduct herself in a civilized manner.

IV.

Colorado Court of Appeals' practice of never permitting oral arguments by pro se non-attorney litigants denies due process and equal protection

Colorado Court of Appeals denied petitioner's motion for oral arguments. It appears that it never permits oral arguments by *pro se* non-attorney litigants. *National Union of Marine Cooks and Stewards v. Arnold*, 348 U.S. 37 (1954) held that an appellate court must exercise statutory review without discrimination.

V.

State criminal statute prohibiting interference with educational institutions is overly broad and interferes with First Amendment rights

As shown above, any member of the University community may have another member cited for violation of criminal statute C.R.S. §18-9-109 because the latter refused to leave a particular area of the University. Clearly, the statute violates First Amendment rights of free expression and violates due process of law.

A statute which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essentials of due process of law. *Roberts v. United States Jaycees,* 468 U.S. 609 (1984).

> The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson,* 461 U.S. 352 (1983).

VI.

42 U.S.C. §1988 and case law developed under it applies to attorney fees in civil rights litigation under §1983 in state courts and preempts any state statute

First and foremost, judgment for attorney fees is null and void because respondent fraudulently obtained jurisdiction of trial court.

In §1983 action, §1988 provisions regarding award of attorney fees preempted any local court rule regarding award of attorney fees. *Varney v. O'Brien,* 383 N.W.2d 213 (Mich. App. 1985).

Civil Rights Attorney's Fee Act, 42 U.S.C. §1988 applies in state as well as in federal courts. *Filipino Accountants Asso-*

ciation v. State Board of Accountancy, (1984, 3rd Dist.) 155 Cal. App. 3.d 1023, 204 Cal. Rptr. 913.

Courts have repeatedly held that defendants in civil rights action are not allowed attorney fees under 42 U.S.C. §1988 because they do not appear before the court to represent public interest. Mere fact that allegations of plaintiff in action brought under Civil Rights Act of 1871 (42 U.S.C. §1983) prove legally insufficient to require trial are not, for that reason alone, "groundless" or "without foundation" so as to permit award of attorney's fees against plaintiff. *Hughes v. Rowe*, 449 U.S. 5 (1980).

Respondents are not allowed attorney fees under §1988 since they confessed their actionable conduct but escaped liability because trial court ruled that their egregious conduct did not rise to the level of constitutional deprivation of petitioner's federal rights.

Trial court ruled and Colorado Court of Appeals affirmed that C.R.S. §§13-17-101 et seq., the state statute on attorney fees applies to federal civil rights claims in state court and awarded respondents their attorney fees, which is in violation of federal law.

Respondents did not document their attorney fees and costs. *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983). In fact, they confessed to filing fraudulent affidavits for costs and attorney fees but only after trial court had entered judgment based on the fraudulent affidavit and after petitioner had discovered and reported the fraud to the court.

At the hearing, respondents had surprised petitioner with the affidavit. The court instantly approved it and immediately signed in chambers a proposed order prepared by respondents without giving petitioner an opportunity to object to its form. Thus, petitioner was repeatedly denied due process.

Petitioner moved that he be compensated for responding to fraudulent and frivolous pleading of respondents. Trial court

ruled that C.R.S. §§13-17-101 et seq., do not permit award of any fees to petitioner since he is not a licensed attorney. The statutes deny due process and equal protection since they award respondent attorney fees and costs for filing fraudulent and frivolous affidavits and pleadings and deny petitioner any compensation for responding to such filings.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

MAHINDER S. UBEROI,
pro se

APPENDIX

SUPREME COURT, STATE OF COLORADO
Case No. 90SC361
Certiorari to the Colorado Court of Appeals 88CA0714
Boulder County District Court 83CV625

ORDER OF COURT

MAHINDER S. UBEROI,

Petitioner,

v.

UNIVERSITY OF COLORADO, a State Institution, WILLIAM McINERNY, JOE ROY, GARY ARAI, JOHN HOLLOWAY, and RICHARD THARP,

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, NOVEMBER 19, 1990.

THE COURT OF APPEALS OF THE STATE OF COLORADO
Case Number 88CA0714

ORDER

MAHINDER S. UBEROI v. UNIVERSITY OF COLORADO BOARD OF REGENTS, ET AL. Upon consideration of the Petition for Rehearing filed by the Appellant herein, said Petition

is hereby DENIED. It is ordered that issuance of the Mandate hereby be, and the same hereby is, stayed to and including 4/30/90, provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the within cause by the Supreme Court.

Fischbach, J.
Smith, J.
Tursi, J.

DATED: March 29, 1990

COLORADO COURT OF APPEALS

No. 88CA0714

MAHINDER S. UBEROI,
Plaintiff-Appellant,

v.

UNIVERSITY OF COLORADO, a State Institution, WILLIAM McINERNY, JOE ROY, GARY ARAI, JOHN HOLLOWAY and RICHARD THARP,

Defendant-Appellees.

APPEAL FROM THE DISTRICT COURT OF BOULDER COUNTY

No. 83CV625

Honorable Roxanne Bailin, Judge

DIVISION II
JUDGMENT AFFIRMED
Opinion by JUDGE FISCHBACH
AND CAUSE

REMANDED WITH
Smith and Tursi, JJ., concur
DIRECTIONS

December 7, 1989

This is an appeal by plaintiff, Mahinder S. Uberoi, from a summary judgment entered against him and in favor of defendants, University of Colorado and certain of its employees, on plaintiff's complaint alleging numerous violations of 42 U.S.C. §1983 (1982). We affirm.

This is the second appeal in this case, Plaintiff's original complaint was dismissed by the trial court because of, among other grounds, a lack of subject matter jurisdiction against defendants under 42 U.S.C. §1983. On appeal, our supreme court held that the state was a "person" and, therefore, was subject to suit under that statue; accordingly, the claims here at issue were reinstated. See *Uberoi v. University of Colorado*, 686 P.2d 785 (Colo. 1984).

On remand, the trial court, on different grounds, again dismissed the complaint, enjoined plaintiff from appearing before it pro se in this case, imposed attorney fees pursuant to §13-17-101, C.R.S. (19878 Repl. Vol. 6A), and fined plaintiff for contempt. Plaintiff does not appeal the injunction entered, but appeals, on eighteen grounds, the remaining orders of the trial court.

I.

While this appeal was pending, the United States Supreme Court ruled, in *Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), that states, governmental entities that are "arms of the state," and state officials acing in their official capacity are not "persons" within the meaning of 42 U.S.C. §1983. In so ruling, the Court overruled our supreme court's determination to the contrary in *Uberoi v. University of Colorado, supra.*

This holding, in essence, validated the trial court's original conclusion that subject matter jurisdiction was lacking.

Therefore, we agree with defendants that plaintiff's remaining claims are barred. Accordingly, although the trial court provided different reasons for its second dismissal of the complaint, we affirm the dismissal on the ground that it lacked subject matter jurisdiction. See *Colorado v. Franc*, 165 Colo. 69, 437 P.2d 48, cert. denied, 392 U.S. 928, 88 S.Ct. 2284, 20 L.Ed.2d 1385 (1968).

II.

Plaintiff also disputes the award of attorney fees entered against him pursuant to §13-17-101, et seq., C.R.S. (1987 Repl. Vol. 6A).

He fist contends that, since the trial court did not award attorney fees in its initial dismissal of his action, it lacked jurisdiction to enter any subsequent award of fees. We disagree.

Contrary to plaintiff's contention, the determination of the trial court not to award attorney fees pursuant to 42 U.S.C. §1988 in its initial judgment does not preclude an award under §13-17-101, et seq., C.R.S. (1987 Repl. Vol. 6A). Attorney fees for frivolous and groundless actions under §13-17-101 are applicable to "any civil action of any nature." Moreover, the fact that the case was on appeal did not deprive the trial court of jurisdiction to award fees. *Baldwain v. Bright Mortgage Co.*, 757 P.2d 1072 (Colo. 1988).

We also disagree with plaintiff that this award of attorney fees was "unauthorized, excessive and undocumented." The record demonstrates that the trial court properly considered the statutory criteria, and its detailed findings concerning the plaintiff's vexatious conduct and lack of substantial justification for the action are amply supported by the record. *Ault Aerial Applicators, Inc. v. Irvine*, 684 P.2d 949 (Colo. App. 1984).

III.

After the entry of judgment against plaintiff for attorney fees pursuant to §13-17-101, defendants served interrogatories upon plaintiff pursuant to C.R.C.P. 69(d). However, plaintiff did not answer them, and, after a hearing, the trial court found him

in contempt pursuant to C.R.C.P. 69(d)(2) and C.R.C.P. 107(d) and assessed additional attorney fees. We reject plaintiff's assertion that the contempt order and the resultant award of fees were in error.

The record does not support plaintiff's allegation that he had not notice of the contempt proceeding. We also disagree with plaintiff that the trial court's order enjoining him from appearing as his own attorney prevented him from filing answers to the interrogatories. C.R.C.P. 69(d)(2) specifically allows a judgment debtor to file such answers without an attorney. Moreover, the record reveals that plaintiff was fully aware of that.

Finally, contrary to plaintiff's argument, the award of additional attorney fees pursuant to C.R.C.P. 69(d)(2) and C.R.C.P. 107(d) is supported by the record. Therefore, we affirm the award. See *in re Marriage of Bernardoni*, 731 P.2d 146 (Colo. App. 1986).

We have examined plaintiff's numerous other contentions and find them to be totally without merit.

IV.

Based upon the briefs and record in this case, we conclude that the manner in which this appeal has been prosecuted has been vexatious. Moreover, this appeal is replete with arguments that have no support in law or facts, which plaintiff reasonably should have known. Therefore, we award to defendants their legal fees and expenses incurred in the defense of this appeal. See *Mission Denver Co. v. Pierson*, 674 P.2d 363 (Colo. 1984).

The judgment is affirmed, and the cause is remanded to the trial court for a determination of the amount of attorney fees and costs incurred by defendants in connection with this appeal to be entered as part of the judgment against plaintiff.

JUDGE SMITH and JUDGE TURSI concur.

DISTRICT COURT, COUNTY OF BOULDER, STATE OF COLORADO

a6

Civil Action No. 83CV625, Division 5

MAHINDER S. UBEROI,
Plaintiff

v.

UNIVERSITY OF COLORADO BOARD OF REGENTS; WILLIAM McINERNY; JOE ROY; GARY ARAI; JOHN HOLLOWAY; and RICHARD THARP,

Defendants.

On October 8, 1987, the following actions were taken in the above captioned case. The Clerk is directed to enter these proceedings in the register of action.

APPEARANCES: No Parties Appearing.

This matter comes before the Court on defendants' motion for summary judgment. Plaintiff has responded and has moved for partial summary judgment.

The purpose of summary judgment is to permit parties to pierce the formal allegations of the pleadings and to save time and expense connected with the trial when, as a matter of law based on undisputed facts, one party could not prevail. Because a grant of summary judgment denies the party opposing the motion the right to trial, summary judgment is appropriate only in those circumstances where there is no dispute as to material facts and thus no role for the fact finder to play; thus, the court may enter summary judgment on behalf of the moving or nonmoving party if, in addition to the absence of any genuine factual issues, the law entitles one party or the other to judgment in its favor. The party against whom summary judgment might otherwise be entered is entitled to the benefit of all favorable inferences that may be drawn from the facts. *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231 (Colo. 1984). The burden of establishing the lack of any genuine factual issues is on the party moving for summary judgment, but once this burden is met, the opposing party must demonstrate that a

converted factual question exists; if the party opposing summary judgment fails to meet this burden, then the court may properly enter summary judgment on behalf of the moving party as long as the operative legal principles entitle it to such judgment. *Pueblo West Metropolitan Dist. v. Southeastern Colorado Water Conservancy Dist.*, 689 P.2d 594 (Colo. 1984).

I. BACKGROUND

Defendant University of Colorado is an institution of the State of Colorado, governed by the Board of Regents with its main offices and campus at Boulder. All individual defendants are employees of the University.

The extensive history of this case begins with an incident occurring on May 12, 1982. On that date, plaintiff Uberoi went to the office of defendant McInerny on the University of Colorado campus and requested records which he claimed were obtainable under the Colorado Open Records Act. The records Uberoi sought were those pertaining to the Joint Institute for Laboratory Astro Physics ("JILA"). Apparently, McInerny and his staff did not give Uberoi immediate attention. After about fifteen minutes, Uberoi asked how long it would take before he would receive the records he requested. At this point, a confrontation ensued. In his complaint, Uberoi alleges that McInerny slammed an office door against him, repeatedly pushed him, and called him :"the most despicable filthy person that ever lived on this earth." In his affidavit, Uberoi states that McInerny beat him with fists on his chest and stomach and then kicked him. (Complaint, para. 10: Uberoi Affidavit, para.4).

University of Colorado Police Department Officers Roy and Arai were summoned to the scene. In his complaint, plaintiff alleges that Officer Arai grabbed him without warning. (Complaint, para. 11). In his affidavit, Uberoi alleges Arai grabbed him and dragged him to a corner of the room, placed him on a couch, and sat down next to him keeping a painful grip on him. (Uberoi Affidavit, para. 6) Plaintiff was allegedly charged with a violation of Colo. Rev. Stat. §18-9-109, interference with University activities. He was held for approximately a half hour on this charge.

In addition, Uberoi alleges that while the incident was in progress, Roy and McInerny had telephone conversations with the defendant John Holloway, an attorney employed by the University. During these conversations these defendants allegedly conspired to keep Uberoi confined without probable cause and to obtain statements prejudicial to Uberoi from McInerny's staff. Uberoi also alleges that defendants Roy, Arai, McInerny, and Holloway conspired to cite him for violating the statue prohibiting interference with University activities. Additionally, plaintiff alleges that defendants are engaged in continuing conspiracy "[t]o frame into unlawful acts plaintiff's lawful requests for inspection of public records." (Complaint, para. 65).

Uberoi filed this action in May of 1983. On December 19, 1983, Honorable Richard McLean granted defendants' motion to dismiss all of plaintiff's claims and plaintiff appealed. The Colorado Supreme Court entered its opinion and order on January 31, 1986, affirming the dismissal of plaintiff's tort claims under state law, the first through sixth and eighth claims for relief, and the dismissal of the ninth claim to the extent it alleges a violation of the due process clause of the fourteenth amendment based on negligence. *Uberoi v. University of Colorado*, 713 P.2d 894 (Colo. 1986). Plaintiff's seventh, tenth, and eleventh claims for relief were reinstated. The ninth claim was reinstated to the extent it alleged gross negligence, recklessness, or intentional conduct under the due process clause of the fourteenth amendment and to the extent that it asserted negligence under amendments other than the fourteenth amendment's due process clause. The reinstated claims, which are the subject matter of the parties' motions in the instant case, assert that on May 12, 1982, the defendants, acting under the color of state law, deprived him of rights secured to him by the first, fourth, fifth, ninth, tenth and fourteenth amendments to the United States Constitution, the Colorado Constitution, and 42 U.S.C. §1983. Uberoi alleges that he was slandered, assaulted, battered and falsely arrested and that the defendants have conspired against him.

II. MERITS

To state a claim for relief under 42 U.S.C. §1983, a plaintiff must demonstrate that he was deprived of a right secured by the Constitution or laws of the United States and that any such deprivation was achieved under the color of law. *Paul v. Davis*, 424 U.S. 693 (1975). Section 1983 does not, standing alone, create any equal or civil rights guaranteed by the Constitution or laws of the United States. See *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979). Moreover, not every right is a product of the federal constitution or laws and those rights that come from the states, rather than from the federal government, are not properly the subject of a §1983 action. See e.g., *Baker v. McCollan*, 443 U.S. 137(1979). In other words, behavior that might constitute a tort under state law is not necessarily compensable under §1983. Instead, §1983 creates a distinct species of tort liability, not to be absorbed into ordinary common-law principles. Section 1983 focuses on the misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. See *Rankin v. City of Wichita Falls*, 762 F.2d 444 (5th Cir. 1985). Thus, only when a state official acts to deprive a party of federal rights using power he possesses by virtue of his public status will liability incur under §1983.

In its opinion and order of January 31, 1986, the Colorado Supreme Court declined to rule on whether there was sufficient evidence to establish plaintiff's claim that the defendants conduct rose to a level of constitutional tort under §1983. This issue, stated the court, could not be resolved in the context of a motion to dismiss for failure to state a claim where the only concern is whether plaintiff';s complaint sufficiently alleges a cause of action under §1983. See *Uberoi v. University of Colorado*, 713 P.2d at 903. The issue of whether the facts as alleged demonstrate a tort of constitutional consequence has, however, been decided by courts in the context of a motion for summary judgment. See e.g., *Wise v. Bravo*, 666 F.2d 1328 (10th Cir. 1981); *Moats v. Village of Schaumburg*, 562 F. Supp. 624 (N.D. Ill. 1983). To withstand a motion for summary judgment, plaintiff, as an adverse party may not rest upon the allegations in his pleading, but his response by affidavit must

set forth specific facts which would raise a genuine issue of constitutional deprivation of his rights. See C.R.C.P. Rule 56(e).

A. CLAIMS AGAINST DEFENDANT McINERNY

Plaintiff has incorporated his claims for assault, battery, and slander against defendant McInerny into his claims for deprivation of constitutional rights. Although plaintiff's affidavit alleges a more vicious level of conduct on the part of McInerny than is alleged in his complaint, the Court, in considering a motion for summary judgment, must view the materials presented by the parties in the light most favorable to the party opposing the motion. *Madison v. Deseret Livestock Co.*, 574 F.2d 1027 (10th Cir. 1978). In his affidavit, Uberoi alleges that McInerny "came from his office and slammed the door hard against me," that he called Uberoi "the most despicable filthy person that ever lived on this earth,": and that McInerny "beat me on my chest then in my stomach with his fists" and "kicked me with his feet." (Uberoi Affidavit, para. 4)

In the view of the Court, the facts alleged in Uberoi's affidavit demonstrate no more than a common law tort claim for assault and battery against McInerny. These facts simply do not show that plaintiff was deprived of a right secured to him by the Constitution. The mere fact that McInerny is a state employee does not elevate plaintiff's claim to a constitutional tort, nor does the fact that that altercation occurred in the setting of a state run office make it factually distinct from a fight between two private citizens. The alleged facts do not reflect that McInerny abused any governmental power in his dealing with plaintiff. Therefore, summary judgment is granted in favor of the defendants on plaintiff's constitutional claims stemming from the alleged assault and battery committed by defendant McInerny.

As to plaintiff's constitutional claim stemming from McInerny's alleged defamation of him, the Court finds that the statement "you are the most despicable, filthy person that ever lived on this earth,": although hardly flattering, amounts to no more than an expression of opinion. There are some statements that are in the form of statements of opinion, or even of fact, which cannot

reasonably be understood to be meant literally or seriously and are obviously mere vituperation and abuse. A certain amount of vulgar name-calling is frequently resorted to and it is properly understood by reasonable listeners to amount to nothing more. This is true particularly when it is obvious that the speaker has lost his temper and is merely giving vent to insult. See *Bucher v. Roberts*, 198 Colo. 1, 595 P.2d 239 (1979); Restatement (Second) of Torts §566 (1976), Comment e. Moreover, the tort of defamation does not constitute a cause of action for deprivation of constitutional rights without the loss of a more tangible interest than reputation. *Paul v. Davis*, 424 U.S. 693 (1976). The Court cannot conceive of what possible damages plaintiff has suffered as a result of McInerny's statement. Summary judgment is granted in favor of defendants with respect to plaintiff's constitutional claims stemming from McInerny's alleged slander.

B. CLAIMS AGAINST DEFENDANTS ROY AND ARAI

Plaintiff claims that Officers Roy and Arai seized, falsely arrested and detained him without probable cause. Plaintiff also claims that Officer Arai assaulted, battered, and used excessive force against him. As a starting point, the Court notes that the element of excessive or unnecessary force is not a prerequisite to or otherwise an essential element of recovery under §1983. See e.g., *Hampton v. City of Chicago*, 484 F.2d 602 (7th Cir. 1973), cert. denied 415 U.S. 917 (1974). Conversely, the use of excessive force in the context of an arrest, albeit an arrest that is itself lawful, is actionable under §1983. See e.g., *Clark v. Ziedonis*, 513 F.2d 79 (7th Cir. 1975). The grounds asserted by plaintiff in support of his recovery are thus independent and severable, and the Court will consider them separately.

Plaintiff alleges that he was falsely arrested ;and that defendant Arai "maliciously kept [him] in his custody without any purpose, suspicion or probable cause" and that defendants McInerny, Roy, and Arai "claimed maliciously and without probable cause that I had intentionally interfered with University operations which is a violation of C.R.S. §18-9-109." (Uberoi Affidavit para. 6 and 7). Defendant Arai avers that Uberoi was

not placed under arrest, nor were charges made against him. (Arai Affidavit para. 6 and 13). It is apparently undisputed that Uberoi was involuntarily detained by Officer Arai for a period of time of 15-30 minutes.

The issue before the Court is not whether there was probable cause to sustain a warrantless arrest of Uberoi. Rather, the issue here is whether defendants Arai and Roy have violated §1983. The test for liability under §1983 is whether a police officer acts in good faith and with a reasonable belief that his conduct is lawful. If he does, his acts are immune from liability. See *Moats v. Village of Schaumburg*, 562 F. Supp. 624, 628 (N.D. Ill. 1983). In *Brubaker v. King*, 505 F.2d 534, 536-37 (7th Cir. 1974), it was stated:

> [The test] under §1983 is not whether the arrest was constitu- tional or unconstitutional or whether it was made with or without probable cause, but whether the officer believed in good faith that the arrest was made with probable cause and whether the belief was reasonable.

See also *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Thus, the qualified immunity from §1983 liability is a less exacting standard than is required to prosecute a criminal or to sustain his arrest.

Arai's affidavit avers that on May 12, 1982, he and Officer Roy responded to the JILA offices on a report of a man attempting to force his way into an office. Once, there, they saw two men, later identified as the plaintiff and McInerny, standing face to face in the doorway to one of the JILA offices. Roy questioned the two men and told Uberoi to remain with Arai in the reception area. While Roy and McInerny went into the JILA offices, Arai told Uberoi that he was being detained while Roy made his investigation. He told Uberoi to remain calm. Approximately 15 to 20 minutes later, Roy returned to the reception area. Roy advised Uberoi that no citation would be issued to him over this incident but that if subsequent disruption of McInerny's office was caused by Uberoi, that he could be issued a citation or arrested for interfering with University activities.

Officer Roy's recitation of the incident in his affidavit is substantially similar to Arai's account although somewhat more detailed. He avers that after responding to a report of a man attempting to force his way into a JILA office, and encountering Uberoi and McInerny, he asked the men for an explanation. Uberoi stated to him that he was a professor and that McInerny had wrongfully refused to give him documents that Uberoi felt he was entitled to, that McInerny was attempting to block his entrance into the office and that McInerny had assaulted him. McInerny stated to Roy that this was his office and he had requested that the police be called. He said that Uberoi had presented a written request for JILA records to one of his staff and had been requested to wait in the reception area until a decision could be made concerning the request. McInerny further told Roy that Uberoi returned to the office prematurely before he had had an opportunity to discuss the request with University counsel, had again been requested to wait in the reception area and was disrupting the working activities of McInerny's staff. It was at this point, avers Roy, that he advised Uberoi that his conduct violated the statute prohibiting interference with the staff or faculty of the University. Roy states that at no time was Uberoi searched or placed under arrest. Uberoi was detained for about 20 minutes after Roy arrived in order for him to investigate the situation, to obtain adequate information about the persons involved and what has occurred prior to his arrival, and for him and McInerny to contact university counsel concerning Uberoi's request for records. Roy avers that it is usual while an investigation is conducted at the scene of the incident. If a person is not cited with a violation or arrested, the person is then advised they can leave. This procedure, states Roy, was employed by himself on May 12, 1982.

Assuming, arguendo, that Officer Roy and Arai's detainment of Uberoi constituted an arrest, the Court would still find from the evidence that the officers actions were responsible and taken in good faith to resolve the situation. Although summary judgment is generally inappropriate where a disputed issue of material fact is one of subjective intent or good faith, the U.S. Supreme Court has ruled that in the proper case summary judgment is appropriate for a police officer who is sued under

§1983, although subjective good faith is at the heart of the qualified immunity defense. *Wood v. Strickland*, 420 U.S. 308 (1975). The conditions are; If a reasonably held, good faith belief in the lawfulness of an action is shown and the officer did not know that his actions would violate the plaintiff's constitutional rights or the officer did not otherwise behave maliciously. Id. at 322.

This is a proper case. Arai and Roy responded to the scene and detained plaintiff until they could complete their investigation of the incident. Roy, in good faith, reasonably believed, after talking to both Uberoi and McInerny and observing the demeanor of the two men, that Uberoi had disrupted McInerny's office and his staff. There is no evidence that Roy and Arai harbored any individualized malice toward the plaintiff. To the contrary, Roy's affidavit avers that detaining persons at the scene of an incident while an investigation is conducted is standard police practice. Moreover, the affidavits of both officers state that neither had met Uberoi prior to the date of May 12, 1982. There is no evidence that the officers knew that their actions might violate plaintiff's constitutional rights. Therefore, summary judgment is granted in favor of the defendants on the issue of false arrest.

Uberoi also alleges Officer Arai used excessive force against him and assaulted and battered him. In his affidavit, Uberoi states that Arai grabbed him, dragged him to a corner of the room, placed him on a couch, and sat down next to him keeping a painful grip on him. (Uberoi Affidavit para. 6). Arai admits to taking plaintiff by the arm and leading him over to a chair and telling him to sit down and wait for Officer Roy's return. (Arai Affidavit para. 8).

From the record, it does not appear that the plaintiff suffered any permanent or serious physical injuries. Uberoi does not claim to have consulted a doctor for treatment of his alleged injuries. While the law does not require that serious or permanent injuries necessarily result, the law does require that the force used be more than the mere techni- cal "battery" that is inextricably a part of any arrest. *Bur v. Gilbert*, 415 F. Supp. 335, 341 (E.D.Wis. 1976). For the Constitution to be violated, the force used must be excessive. Id. The test for imposing liability is whether the officer's conduct "shocks the con- science."

Rochin v. California, 342 U.S. 165, 172 (1952).

Even assuming plaintiff proved at trial that Arai grabbed him, dragged him and held him down with a painful grip, his claim does not rise to the level of a constitutional violation. The alleged conduct is not behavior that would shock the conscience of a reasonable person. Compare *Raley v. Fraser*, 747 F.2d 287 (5th Cir. 1984) (Police officer put choke hold on plaintiff four times during arrest, plaintiff suffered scrapes and bruises and sore throat but no permanent injury. Officer's conduct did not rise to constitutional level.); *Moats v. Village of Schaumburg*, 562 F. Supp. 624 (N.D. Ill. 1983) (Officer allegedly roughly twisted plaintiff's arm during arrest. Court found no constitutional deprivation and granted summary judgment for the officer.) The Court grants summary judgment in favor of defendants on Plaintiff's constitutional claims stemming from his claims of excessive force, assault, and battery against defendant Arai.

In summary, the Court grants summary judgment in favor of defendants of plaintiff's seventh, ninth, and eleventh claims for relief. As to the seventh claim alleging violation of civil rights, the Court has ruled, as a matter of law, that under the alleged facts plaintiff has failed to demonstrate that the defendants;' conduct deprived him of a constitutional right. Thus, plaintiff's claim alleging a deprivation of civil rights cannot be maintained. As to the ninth claim, which alleges negligence, the Colorado Supreme Court, in its order of January 31, 1986, ruled that plaintiff's complaint was sufficient to the extent it alleged gross negligence, recklessness, or intentional deprivation of constitutional rights under the due process clause. The Court here, in considering a motion for summary judgment, rules that even assuming the conduct of defendants was intentional, reckless, or grossly negligent, the facts as alleged by the plaintiff do not demonstrate a denial of due process such as to be cognizable under §1983 as a matter of law. In addition, with respect to the ninth claim for relief, because the Court has ruled that as a matter of law defendants alleged conduct does not rise to the level of a constitutional tort, a claim for negligence under amendments to the Constitution other than the fourteenth amendment's due process clause cannot be maintained. The evidence, even when viewed in a light most favorable to the

plaintiff, simply does not demonstrate a tort of constitutional consequence no matter what amendment plaintiff chooses to fit the defendants' alleged conduct under. Lastly, for the same foregoing rationale, the Court would award summary judgment in favor of defendants on plaintiff's eleventh claim for relief. The alleged facts do not support a claim of constitutional significance as would be cognizable under the due process clause of the fourteenth amendment and §1983.

C. CONSPIRACY CLAIMS

Uberoi's tenth claim for relief alleges the defendants entered into a conspiracy to assault, batter, and falsely arrest him, to violate his constitutional rights, and to "frame into unlawful acts plaintiff's lawful requests for inspection of public records." The elements of a conspiracy claim under §1983 are as follows: (1) that the defendants conspired together, (2) that defendants acted under the color of state law, (3) that defendants deprived plaintiff of a federal right, and (4) that overt acts were done pursuant to the conspiracy which caused damage to the plaintiff. *Espinoza v. O'Dell*, 633 P.2d 455, 468 (Colo. 1981).

The Court has ruled that plaintiff's claims against defendants for assault, battery, and false arrest failed to rise to a level of constitutional deprivation. Thus, to the extent plaintiff complains that the defendants conspired to commit these acts, he has failed to show a deprivation of a federal right and his conspiracy claim must fail. Likewise, to the extent plaintiff alleges defendants conspired to deny him access to University records he has failed to show a deprivation of a federal right. In *Uberoi v. University of Colorado*, 686 P.2d 785 (Colo. 1984), the Colorado Supreme Court upheld the denial of inspection of JILA records finding that the Open Records Act was not applicable to the University and that the University could lawfully deny Uberoi access to the requested records. Because Uberoi has no right to access of these records, defendants could not, in this case, conspire to deny him such a right. Summary judgment is granted in favor of defendants on plaintiff's tenth claim for relief.

For the foregoing reasons, defendants' motion for summary judgment is GRANTED and plaintiff's motion for partial summary

judgment is DENIED.

DONE IN CHAMBERS this 8th day of October, 1987.

BY THE COURT:
ROXANNE BAILIN,
DISTRICT COURT JUDGE _____

DISTRICT COURT, COUNTY OF BOULDER, STATE OF COLORADO

Civil Action No. 83CV625, Division 5

AMENDED JUDGMENT

MAHINDER S. UBEROI,

Plaintiff,

v.

UNIVERSITY OF COLORADO BOARD OF REGENTS; WILLIAM McINERNY; JOE ROY; GARY ARAI; JOHN HOLLOWAY; and RICHARD THARP,

Defendants.

IT IS HEREBY ORDERED that the Order of April 20, 1988, is amended at page 8 to read as follows:

Therefore, the Court will award attorneys' fees and costs in the full amount requested of $29,042.90 and costs in the amount of $4,079.23.

WHEREFORE, the court orders plaintiff pay to defendants attorneys' fees and costs for legal expenses incurred in defending against claims brought by the plaintiff. The Court finds that all

claims brought by the plaintiff in this lawsuit were without substantial justification. The Court finds that said claims were substantially groundless and substantially vexatious. The Court further finds that the plaintiff unduly expanded the litigation needlessly. The Court orders that plaintiff pay to defendants attorneys' fees in the amount of $29,042.90 and costs in the amount of $4,079.23.

Dated this 31st day of May, 1988.

BY THE COURT:
ROXANNE BAILIN,
DISTRICT COURT JUDGE

No. 91-561

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MAHINDER S. UBEROI,

Petitioner,

v.

UNIVERSITY OF COLORADO, a State Institution, WILLIAM MCINERNY, JOE ROY, GARY ARAI, JOHN HOLLOWAY, and RICHARD THARP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

BRIEF FOR RESPONDENTS IN OPPOSITION

JOHN ROGER MANN*
COOPER & KELLEY, P.C.
1660 Wynkoop Street,
Suite 900
Denver, Colorado 80202-1197
(303) 825-2700

Attorneys for Respondents

*Counsel of Record

QUESTIONS PRESENTED

This is a civil rights action brought by a *pro se* litigant against a State University and its officers, based on the brief detention of the Petitioner resulting from his trespass on University property. The trial court intially dismissed the complaint on the ground that the Respondents were not subject to suit under 42 U.S.C. § 1983, but the Colorado Supreme Court reversed, holding that the University was a "person" subject to suit under § 1983. After remand, the trial court granted summary judgment for Respondents based on Petitioner's failure to establish the deprivation of any federal constitutional right. During the pendency of the appeal, the Supreme Court overruled the prior decision of the Colorado Supreme Court, effectively reinstating the trial court's order of dismissal. The Colorado Court of Appeals affirmed and the Colorado Supreme Court denied certiorari. The questions presented are as follows:

1. Whether the Colorado Court of Appeals correctly held that the University of Colorado and its officials acting in their official capacities are not "persons" subject to suit under 42 U.S.C. § 1983 in affirming the judgment of the trial court after this Court's intervening decision in *Will* v. *Michigan Department of State Police,* 491 U.S. 58 (1989)?

2. Whether Petitioner has adequately preserved any of his other issues for Supreme Court review?

STATEMENT PURSUANT TO RULE 29.1

Respondents are not corporations and have no parent companies, subsidiaries or affiliates.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 91-561

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MAHINDER S. UBEROI,

Petitioner,

v.

UNIVERSITY OF COLORADO, a State Institution, WILLIAM MCINERNY, JOE ROY, GARY ARAI, JOHN HOLLOWAY, and RICHARD THARP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, the University of Colorado, a State Institution, William McInerny, Joe Roy, Gary Arai, John Holloway, and Richard Tharp, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the decision of the Court of Appeals of the State of Colorado in this case.

OPINION BELOW

The opinion of the Court of Appeals of the State of Colorado (Pet. App. a2-a5) is unpublished and unreported. See Colo. App. R. 35(f).

JURISDICTION

The judgment of the Court of Appeals of the State of Colorado was entered on December 7, 1989. On November 19, 1990, the Supreme Court of the State of Colorado denied a petition for certiorari to the Colorado Court of Appeals. The petition for writ of certiorari was filed in this Court on April 18, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTES INVOLVED

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses

against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1982, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

COLO. REV. STAT. § 13-17-101. Legislative declaration

The general assembly recognizes that courts of record of this state have become increasingly burdened with litigation which is straining the judicial system and interfering with the effective administration of civil justice. In response to this problem, the general assembly hereby sets forth provisions for the recovery of attorney fees in courts of record when the bringing or defense of an action, or part thereof (including any claim for exemplary damages), is determined to have been substantially frivolous, substantially groundless, or substantially vexatious. All courts shall liberally construe the provisions of this article to effectuate substantial justice and comply with the intent set forth in this section.

COLO. REV. STAT. § 13-17-102. Attorney fees

(1) Subject to the provisions of this section, in any civil action of any nature commenced or appealed in any court of record in this state, the court may award, except as this article otherwise provides, as

part of its judgment and in addition to any costs otherwise assessed, reasonable attorney fees.

(2) Subject to the limitations set forth elsewhere in this article, in any civil action of any nature commenced or appealed in any court of record in this sate, the court shall award, by way of judgment or separate order, reasonable attorney fees against any attorney or party who has brought or defended a civil action, either in whole or in part, that the court determines lacked substantial justification.

(3) When a court determines that reasonable attorney fees should be assessed, it shall allocate the payment thereof among the offending attorneys and parties, jointly or severally, as it deems most just, and may charge such amount, or portion thereof, to any offending attorney or party.

(4) The court shall assess attorney fees if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposes for delay or harassment or by other improper conduct, including, but not limited to, abuse of discovery procedures available under the Colorado rules of civil procedure or a designation by a defending party under section 13-21-111.5(3) that lacked substantial justification. As used in this article, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

(5) No attorney fees shall be assessed if, after filing suit, a voluntary dismissal is filed as to any claim or action within a reasonable time after the attorney or party filing the dismissal knew, or reasonably should

have known, that he would not prevail on said claim or action.

(6) No party who is appearing without an attorney shall be assessed attorney fees unless the court finds that the party clearly knew or reasonably should have known that his action or defense, or any part thereof, was substantially frivolous, substantially groundless, or substantially vexatious; except that this subsection (6) shall not apply to situations in which an attorney licensed to practice law in this state is appearing without an attorney, in which case, he shall be held to the standards established for attorneys elsewhere in this article.

(7) No attorney or party shall be assessed attorney fees as to any claim or defense which the court determines was asserted by said attorney or party in a good faith attempt to establish a new theory of law in Colorado.

(8) The provisions of this section shall not apply to traffic offenses, matters brought under the provisions of the "Colorado Children's Code", title 19, C.R.S., or related juvenile matters, or matters involving violations of municipal ordinances.

STATEMENT OF THE CASE

This is a civil rights action under 42 U.S.C. § 1983 brought in state court against a state university and its officers. Petitioner Mahinder S. Uberoi is a professor of engineering at the University of Colorado. Petitioner is not a licensed attorney.

Respondent University of Colorado is an institution of higher education established and maintained by the State of Colorado pursuant to COLO. CONST. art. VIII, § 5 and COLO. REV. STAT. § 23-20-101 *et seq.* (1988). Respondent William

McInerny is Executive Officer for the Joint Institute for Laboratory Astrophysics (JILA), a research institution jointly operated by the University of Colorado and the United States Department of Commerce, National Bureau of Standards. Respondents Joe Roy and Gary Arai are police officers with the University of Colorado Police Department. Respondent John Holloway is executive assistant to the Chancellor of the University. Respondent Richard Tharp is an attorney in the Office of University Counsel.

All of Petitioner's claims arose from a single incident that occurred on the afternoon of May 12, 1982. That afternoon, Petitioner Uberoi appeared at Respondent McInerny's office without notice or an appointment and requested inspection of various JILA records. McInerny asked Petitioner to wait in a reception area, where Petitioner handed the receptionist a note requesting to inspect "detailed monthly expenditures of the account of the JILA Administration, for the current fiscal year." After reviewing Petitioner's note, McInerny checked with the Chairman of JILA, who advised him to call University Counsel about whether or not such information had to be disclosed. As McInerny was about to call University Counsel, he was informed by an assistant that Petitioner's conduct in the reception area was becoming disruptive and hostile.

McInerny entered the reception area and observed that Petitioner had planted himself in the middle of the doorway that was the only passageway from the McInerny's office and the hallway. Petitioner was asked to leave the office but refused to do so. Instead, he demanded an immediate reponse to his request to inspect JILA records. McInerny again asked Petitioner to wait in the reception area and Petitioner again refused to leave.

According to Petitioner, McInerny then pushed him out of the doorway, "slammed the door hard" against Petitioner, then beat Petitioner on his chest and stomach with his fists and kicked him with his feet. This scuffle was allegedly

accompanied by some hyperbolic verbal abuse by McInerny directed at Petitioner. Although Respondents emphatically deny Petitioner's account of the facts, they accepted it as true for purposes of their motion for summary judgment, as did the trial court. (Pet. App. a6-a17).

When Petitioner still refused to leave, a JILA staff member called police, and Officers Roy and Arai responded. After questioning Petitioner and McInerny, Officer Roy advised Petitioner that his conduct violated COLO. REV. STAT. § 18-9-109 (1980), and asked him to wait with Officer Arai while he and McInerny conferred with Respondent Holloway about Petitioner's request. Holloway instructed McInerny not to produce the JILA records requested by Petitioner. Respondent Tharp was not present at JILA on May 12, 1982, and was never called by anyone about this incident. During this time, Petitioner attempted to leave, but was restrained by Officer Arai.

Roy and McInerny returned to the reception area and informed Petitioner that his request for inspection was denied. Although Petitioner was issued a warning, he was not arrested or charged with any offense. After being briefly detained, Petitioner was released without being arrested or charged. His detention for questioning lasted only about twenty minutes. At the time of the incident, all individual Respondents were acting within the course and scope of their employment with the University of Colorado and in their official capacities therewith.

Although Petitioner asserts that his request to inspect JILA records was made pursuant to the Colorado Open Records Act, COLO. REV. STAT. § 24-72-201 *et seq.* (1982), as of May 12, 1982, the University of Colorado was not subject to that legislation, as the Colorado Supreme Court ruled in a lawsuit brought by this same Petitioner. *See Uberoi* v. *University of Colorado*, 686 P.2d 785 (Colo. 1984). The Colorado Open Records Act was not amended by the Colorado General

Assembly to subject the University of Colorado to its provisions until June 6, 1985. *See* COLO. SESS. LAWS 1985, ch. 208, § 1; COLO. REV. STAT. § 24-72-202(1.5) (1988). Therefore, at the time of the incident giving rise to Petitioner's suit, neither Petitioner nor anyone else had any statutory right to inspect the University records in question.

On May 9, 1983, Petitioner filed suit, alleging civil rights violations under § 1983 and various common law tort claims. The first six tort claims were pleaded as slander, assault, and battery against McInerny, assault and battery against Arai, and false arrest against both Roy and Arai. The seventh claim alleged violation of Petitioner's constitutional rights under the First, Fourth, Fifth, Ninth, Tenth, and Fourteenth Amendments. The eighth claim was for negligent hiring by the University of the other Respondents, and the ninth claim also asserted various claims sounding in negligence. The tenth claim was against all Respondents for conspiracy to violate Petitioner's civil rights. The eleventh claim asserted deprivation of due process under the Fourteenth Amendment. Petitioner's complaint sought only money damages; although Petitioner subsequently attempted to amend the complaint "by interlineation" to seek injunctive relief, leave to amend was neither sought nor granted by the trial court.

On December 19, 1983, the trial court dismissed Petitioner's civil rights claims, holding that the word "person" as it appears in § 1983 does not include states. Petitioner's state law tort claims had previously been dismissed on December 13, 1983, for his failure to comply with the notice requirement of the Colorado Governmental Immunity Act, COLO. REV. STAT. § 24-10-109 (1982).

Petitioner appealed to the Colorado Supreme Court, which affirmed the trial court's judgment of dismissal of the tort claims, but reversed its dismissal of the § 1983 claims, holding that the University of Colorado was a "person" subject to suit under § 1983. *Uberoi* v. *University of Colorado*, 713 P.2d 894 (Colo. 1986). After remand, summary judgment

was granted on October 8, 1987 for all Respondents based upon Petitioner's failure to show the deprivation of any clearly established federal constitutional right, and upon official immunity for discretionary acts (Pet. App. a6-a17).

Petitioner appealed the summary judgment to the Colorado Supreme Court, which transferred the case to the Colorado Court of Appeals for lack of jurisdiction. *Uberoi* v. *University of Colorado* (Colo. No. 87SA447, January 20, 1988). Because the Respondents' claim for attorney fees under COLO. REV. STAT. § 13-17-101 *et seq.* (1987) had not been resolved by the trial court, the Colorado Court of Appeals dismissed the appeal for lack of a final appealable order under COLO. APP. R. 1. *Uberoi* v. *University of Colorado* (Colo. App. No. 88CA0115, February 2, 1988).

After hearing, on April 20, 1988, Respondents were awarded attorney fees and costs pursuant to COLO. REV. STAT. § 13-17-102 (1987), upon the trial court's finding that Petitioner's claims lacked substantial justification. Petitioner has failed to include the trial court's order awarding attorney fees and costs in the Appendix to his Petition for Writ of Certiorari.

Petitioner appealed the final order of the trial court to the Colorado Court of Appeals, which affirmed on all grounds. *Uberoi* v. *University of Colorado* (Colo. App. No. 88CA0714, December 7, 1989) (not selected for official publication) (Pet. App. a2-a5).

On June 15, 1989, between the time the trial court entered summary judgment for Respondents and the time the Colorado Court of Appeals issued its decision, this Court decided *Will* v. *Michigan Department of State Police*, 491 U.S. 58 (1989). Relying on *Will*, the Colorado Court of Appeals affirmed the judgment on the ground that the trial court lacked subject matter jurisdiction. As the Colorado Court of Appeals observed, the holding in *Will*, "in essence, validated the trial court's original conclusion that subject

matter jurisdiction was lacking." *Uberoi* v. *University of Colorado, supra*, slip op. at 2 (Pet. App. a3-a4).

The Colorado Court of Appeals also determined that Petitioner's appeal was "relete with arguments that have no basis in law or facts, which plaintiff reasonably should have known," and that "the manner in which this appeal has been prosecuted has been vexatious" (Pet. App. a5). Based on this finding, the Colorado Court of Appeals awarded Respondents their attorney fees incurred in the appeal pursuant to COLO. APP. R. 38(d) (*id.*).

Uberoi's petition for rehearing was denied by the Colorado Court of Appeals on March 29, 1990 (Pet. App. a1-a2).

On November 19, 1990, Petitioner's petition for writ of certiorari to the Colorado Court of Appeals was denied by the Colorado Supreme Court (Colo. No. 90SC361) (Pet. App. a1).

Because of his propensity for bringing frivolous and vexatious litigation, Petitioner has been permanently enjoined from any further *pro se* appearance in both the Twentieth Judicial District of the State of Colorado and the United States District Court for the District of Colorado. *University of Colorado* v. *Uberoi* (Colo. App. No. 89CA0124, October 18, 1990) (not selected for official publication), *cert. denied*, (Colo. No. 90SC752, April 15, 1991); *Board of Regents of the University of Colorado* v. *Uberoi* (Civ. No. 88-F-1323) (D. Colo., September 25, 1989), *aff'd*, (Nos. 89-1117, 89-1304, 89-1337) (10th Cir., May 25, 1990), *reh'g denied*, (10th Cir., July 6, 1990).

REASONS FOR DENYING THE PETITION

I.

Petitioner's only issues which raise questions of federal law concern his claims for relief under 42 U.S.C. § 1983 and the effect of this Court's intervening decision which overruled

the prior decision of the Colorado Supreme Court in this case. Because the decision of the Colorado Court of Appeals rendered after this Court's intervening decision in conformity therewith was correct, it should not be reviewed.

A.

In *Will* v. *Michigan Department of State Police*, 491 U.S. 58 (1989), this Court held that "States or governmental entities that are considered to be 'arms of the State' for Eleventh Amendment purposes" are not "persons" within the meaning of 42 U.S.C. § 1983. The Court based its holding on a review of Congressional intent in enacting § 1983, concluding that there was:

> nothing substantial in the legislative history that leads use to believe that Congress intended that the word "person" in § 1983 included the States of the Union.

Id., 491 U.S. at 69. *See also Ngiraingas* v. *Sanchez*, 495 U.S. 182 (1990).

The Court went on to hold that state officials acting in their official capacity are also immune from suit under § 1983. As Justice White explained:

> [A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon* v. *Holt*, 469 U.S. 464, 471 (1985). ***As such, it is no different from a suit against the State itself.*** *See, e.g., Kentucky* v. *Graham*, 473 U.S. 159, 165-166 (1985); *Monell, supra* [v. *New York Dept. of Social Services*, 436 U.S. 658 (1983)], at 690, n. 55. We see no reason to adopt a different rule in the present context, particularly when such rule would allow petitioner to circumvent congressional intent by a mere pleading device. [Emphasis added.]

Will v. *Michigan Dept. of State Police, supra,* 491 U.S. at 71.

In its opinion in Will, the Court disapproved and overruled the Colorado Supreme Court's decision in *Uberoi* v. *University of Colorado,* 713 P.2d 894, 900-901 (Colo. 1986), which held, in the instant case, that the University of Colorado was a "person" subject to suit under § 1983. This Court cited the Colorado Supreme Court's decision in *Uberoi* v. *University of Colorado* as an example of the courts that "have taken the position that a State is a person under § 1983." *Will* v. *Michigan Department of State Police,* 491 U.S. at 61, n. 3.

Because the University of Colorado is considered an "arm of the state" for purposes of Eleventh Amendment immunity, *see Rozek* v. *Topolnicki,* 865 F.2d 1154 (10th Cir. 1989); *see also* COLO. CONST. art. VIII, § 5; COLO. REV. STAT. § 23-20-101 *et seq.* (1988), and because a State, its agencies, and its officials in their official capacities, which include the University, its Board of Regents, and its officers and agents, are immune from prosecution in state court under § 1983, all of Petitioner's § 1983 claims against the Respondents, who are sued in their official capacities, are barred. *Will* v. *Michigan Department of State Police, supra.* The Colorado Court of Appeals was correct in so holding.

Petitioner contends that *Will* did not overrule the Colorado Supreme Court's prior determination that the University was a "local governing body" subject to suit under § 1983 pursuant to *Monell* v. *Department of Social Services,* 436 U.S. 658 (1978). However, this is not what the Colorado Supreme Court held; it held only that the University of Colorado is a "person" subject to suit under § 1983:

> Even though *Monell* did not specifically address the question of whether a state university is a "person" under § 1983, its reasoning logically requires us to conclude that a state university is a "person" within the meaning of § 1983.

Uberoi v. *University of Colorado, supra,* 713 P.2d at 900. Petitioner's contention is thus incorrect: *Will* ***explicitly*** overruled this determination. Recent appellate decisions from Colorado have also recognized that *Will* precludes suit under § 1983 against a state agency or state official in his official capacity. *See Lucchesi* v. *State of Colorado,* 807 P.2d 1185 (Colo. App. 1990); *Wigger* v. *McKee,* 809 P.2d 999 (Colo. App. 1990); *Stjernholm* v. *Colorado State Board of Chiropractic Examiners,* ____ P.2d ____ (Colo. App. No. 90CA1385, September 12, 1991); *see also Ruark* v. *Colorado Department of Corrections,* 928 F.2d 947, 950 (10th Cir. 1991).

In any event, if the Colorado Supreme Court determined that a state university, chartered by the state constitution, is a "local governing body" subject to suit under § 1983, then it was in error. The test in *Will* is whether the governmental entity is considered an "arm of the State" for purposes of Eleventh Amendment immunity. This Court expressly limited the holding in *Monell* to "local government units which are not considered part of the State for Eleventh Amendment purposes." *Monell* v. *Department of Social Services, supra,* 436 U.S. at 690, n. 54. *See, e.g., Mt. Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274 (1977). In *Quern* v. *Jordan,* 440 U.S. 332, 338 (1979), the Court made clear not only that § 1983 does not abrogate the States' Eleventh Amendment immunity, but also that the holding in *Monell* is limited to local government units such as municipalities which are not part of the State. Consequently, if a governmental entity is not a "local government unit" but an "arm of the State," then it is immune from liability under § 1983 because it is not a "person" who is subject to suit.

Whether a governmental entity is considered an "arm of the State" for purposes of Eleventh Amendment immunity is a question of federal constitutional law. *See Mt. Healthy City School District Board of Education* v. *Doyle, supra,* 429 U.S. at 279-281. The tests for whether a governmental entity is an arm of the State, as distinguished from so-called political

subdivisions such as counties, municipalities, and other "local governing bodies," are: (1) to what extent does the entity, although carrying out a state mission, function with substantial autonomy from the state government, and (2) to what extent is the entity financed independently of the state treasury. *See Unified School District No. 480* v. *Epperson*, 583 F.2d 1118, 1121-1122 (10th Cir. 1978). The bar of the Eleventh Amendment also extends to suits against state officials acting in their official capacities. *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U.S. 459 (1945).

State universities are generally subject to the complete control of and are financed by the state. *See Brennan* v. *University of Kansas*, 451 F.2d 1287 (10th Cir. 1971). Thus, in the context of a § 1983 action, state colleges and universities are generally held to be "arms of the State" which are immune from suit under the Eleventh Amendment. *See Hamilton Manufacturing Co.* v. *Trustees of State Colleges*, 356 F.2d 599, 601 (10th Cir. 1966); *Williams* v. *Eaton*, 443 F.2d 422, 427-429 (10th Cir. 1971); *Prebble* v. *Brodrick*, 535 F.2d 605, 609-610 (10th Cir. 1976); *Korgich* v. *Regents of New Mexico School of Mines*, 582 F.2d 549, 551-552 (10th Cir. 1978); *Brennan* v. *University of Kansas*, 451 F.2d at 1290-1291. ***Accord:*** *Ronwin* v. *Shapiro*, 657 F.2d 1071, 1072-1074 (9th Cir. 1981); *Rutledge* v. *Shapiro*, 660 F.2d 1345, 1349-1350 (9th Cir. 1981), *aff'd sub nom. Kush* v. *Rutledge*, 460 U.S. 719 (1983); *Clay* v. *Texas Women's University*, 728 F.2d 714 (5th Cir. 1984); *Hall* v. *Medical College of Ohio*, 742 F.2d 299, 301-302 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985); *Bailey* v. *Ohio State University*, 487 F. Supp. 601 (S.D. Ohio 1980); *Vaughn* v. *Regents of University of California*, 504 F. Supp. 1349, 1352-1354 (E.D. Cal. 1981); *Kompara* v. *Board of Regents of the State University & Community College System of Tennessee*, 548 F. Supp. 537 (M.D. Tenn. 1982); *Hutchins* v. *Board of Trustees of Michigan State University*, 595 F. Supp. 862 (W.D. Mich. 1984); *Johnson* v. *University of Nevada*, 596 F. Supp. 175 (D. Nev. 1984); *Hoferek* v. *University of Missouri*, 604 F. Supp. 938 (W.D. Mo. 1985). *Cf.*

Weisbord v. *Michigan State University*, 495 F. Supp. 1347 (W.D. Mich. 1980) (dismissing § 1983 action because of Eleventh Amendment immunity despite finding that state university was "person" under § 1983).

In particular, the University of Colorado is an institution of the State of Colorado, and is not a "local governing body" such as a county or municipality. The Colorado Constitution provides that the establishment and management of the University of Colorado "shall be subject to the control of the state, under the provisions of the constitution and such laws as the general assembly may provide." COLO. CONST. art. VIII, § 5(1). *See City of Boulder* v. *Regents of University of Colorado*, 179 Colo. 420, 501 P.2d 123 (1972); *see also Colorado Civil Rights Commission* v. *Regents of the University of Colorado*, 759 P.2d 726, 727 (Colo. 1988). The Board of Regents of the University of Colorado is a body corporate which is a part of the State of Colorado; it is the department of the State to which is entrusted the supervision and government of the University. COLO. CONST. art. IX, § 12; *see In re Macky's Estate*, 46 Colo. 79, 102 P. 1075 (1909). Under COLO. CONST. art. VIII, § 5, this body corporate is under the control of the General Assembly. Vacancies on the Board are filled by the governor. COLO. REV. STAT. § 23-20-105 (1988).

Although the Board of Regents has broad powers in governing the University, *see* COLO. REV. STAT. § 23-20-111 (1988), its powers of investment and funding are limited. It does not have the power to levy or collect taxes, and it must report regularly to the General Assembly on its investments. *See* COLO. REV. STAT. §§ 23-20-118 to 23-20-121 (1988). The Board is represented in lawsuits by the Attorney General of the State of Colorado, *see* COLO. REV. STAT. § 23-20-110 (1988), and no claim against the University may be settled without the Attorney General's consent. *See* COLO. REV.

STAT. § 24-10-112 (1989). While the Board may solicit donations, *see* COLO. REV. STAT. § 23-20-120 (1988), the University is, for the most part, financed directly from the state treasury. *See* COLO. REV. STAT. §§ 23-1-104, 23-1-105 (1988).

More than eighty years ago, the Colorado Supreme Court declared that the Board of Regents:

> is fostered by the State. Appropriations are made and confided to it, which are raised by taxation upon the property of the people of the state. It is a public corporation in which the Regents have no private interest whatever. It is an agency of the state for the government of the University. Its property and rights are the property and rights of the state.

In re Macky's Estate, supra, 46 Colo. at 96, 102 P. at 1081.

Because the University is a dependent instrumentality of the State of Colorado, and is not an autonomous political subdivision such as a city or school district, the test for whether the University of Colorado is an "arm of the State" for purposes of Eleventh Amendment immunity is thus satisfied. In *Rozek* v. *Topolnicki, supra*, the United States Court of Appeals for the Tenth Circuit answered this very question with respect to the University of Colorado:

> The district court did not err in concluding that . . . the University of Colorado [is] entitled to Eleventh Amendment immunity in this case. Moreover, Congress did not abrogate the states' Eleventh Amendment immunity when it enacted 42 U.S.C. § 1983. *Quern* v. *Jordan*, 440 U.S. 332 (1979).

Id., 865 F.2d at 1158. *See also Martinez* v. *Board of Regents* (Civ. No. 82-F-377, slip op.) (D. Colo., September 9, 1982); *Kimboko* v. *Regents of University of Colorado* (Civ. No. 83-JM-2270, slip op.) (D. Colo., April 4, 1984).

Hence, because the University of Colorado is an "arm of the State" which is immune from suit in federal court under

the Eleventh Amendment, neither it nor any of its officers acting in their official capacities is a "person" which is subject to suit under § 1983. *Will* v. *Michigan Department of State Police, supra.*

Consequently, because this Court's decision in *Will* directly overruled the Colorado Supreme Court's prior decision in this case which reversed the trial court's prior dismissal of Petitioner's § 1983 claims on the ground that the Respondents could not be sued under § 1983, the Colorado Court of Appeals correctly held that Petitioner's civil rights claims cannot be maintained, and its decision should not be reviewed.

B.

Petitioner next asserts that the trial court still retains subject matter jurisdiction over his § 1983 claims against the Respondents in their personal capacities and his alleged claims for injunctive relief under § 1983. Respondents do not deny that the Court's decision in *Will* concerned only suits against State officials in their official capacities, and that suits under § 1983 may still be maintained against State officials in their personal capacities. *See Kentucky* v. *Graham*, 473 U.S. 159 (1985). Nor do Respondents dispute that a suit for injunctive relief may be maintained against a State official in his official capacity under § 1983. *See Will* v. *Michigan Department of State Police, supra*, 491 U.S. at 71, n. 10.

Nevertheless, these issues are not properly before this Court. First, Petitioner did not seek injunctive relief in the trial court. Although Petitioner attempted to amend his complaint to seek injunctive relief, leave to amend was neither sought nor granted by the trial court. Failure to preserve this issue below precludes its consideration by this Court. *See Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 76-80 (1988).

Similarly, Petitioner has failed to preserve for review the issue concerning remand of his personal capacity claims. Petitioner has ignored SUP. CT. R. 14.1(h) by failing to specify the stage of the proceedings in which this question sought to be reviewed was raised. The record shows that this issue was never raised by Petitioner either in his Petition for Rehearing in the Colorado Court of Appeals, or in his Petition for Writ of Certiorari in the Colorado Supreme Court. Hence, this issue, too, has not been preserved for Supreme Court review. *See Bankers Life & Casualty Co.* v. *Crenshaw, supra.*

Moreover, the trial court expressly ruled on the merits of Petitioner's § 1983 claims against the Respondents in their personal capacities in its October 8, 1987 order granting summary judgment. (Pet. App. 6a-23a). The trial court found that, even viewing the allegations of the complaint in the light most favorable to Petitioner, he had failed to demonstrate that the Respondents had deprived him of any clearly established federal constitutional right. *See Harlow* v. *Fitzgerald,* 457 U.S. 800, 815-819 (1982); *Mitchell* v. *Forsyth,* 472 U.S. 511, 530-535 (1985). In so doing, the trial court presumed that the Respondents were acting under color of State law; hence, Petitioner's issues concerning whether Respondents were acting under color of State law and the alleged violation of his constitutional rights not only have not been preserved for review, but they are also moot.

Further, as indicated above, because Petitioner did not seek review of the trial court's disposition of his personal capacity claims against the individual Respondents in either the Colorado Court of Appeals or the Colorado Supreme Court, he has failed to preserve this issue for review, as it was neither pressed nor passed upon in the state court.

C.

In his only other issue which raises any question of federal law, Petitioner asserts that COLO. REV. STAT. § 13-17-101 *et seq.* (1987) does not apply to awards of attorney fees for groundless and frivolous litigation under § 1983. Once again, this issue was neither passed on by the Colorado Court of Appeals nor raised in either Petitioner's Petition for Rehearing to that court or in his Petition for Writ of Certiorari to the Colorado Supreme Court. Accordingly, it has not been adequately preserved for Supreme Court review. *See Bankers Life & Casualty Co.* v. *Crenshaw, supra.*

Nevertheless, the trial court properly applied the statute to this proceeding. The trial court held that COLO. REV. STAT. § 13-17-102 (1987) applied to all claims brought by Plaintiff in state court, including his federal civil rights claims. *See* COLO. REV. STAT. § 13-17-102(1) (1987) (court may award attorney fees "in any civil action of any nature"). Petitioner's argument that this statute is "preempted" by 42 U.S.C. § 1988 is not well taken. Section 1988 expressly provides for concurrent state and federal jurisdiction and the applicability of state law, including state statutes, and does not preempt state law, insofar as it is not "inconsistent" with § 1988. In resolving questions of consistency between state and federal law raised under § 1988, courts must look not only at particular federal statutes, but also at the policies expressed in them; of particular importance is whether application of the state law would be inconsistent with the federal policy underlying the cause of action under consideration. *Robertson* v. *Wegmann,* 436 U.S. 584, 590 (1978). Moreover, state law is to be "borrowed" when appropriate under § 1988. *See Board of Regents* v. *Tomanio,* 446 U.S. 478, 483-486 (1980).

Section 1988, like COLO. REV. STAT. § 13-17-102, authorizes an award of attorney fees to a prevailing defendant when an action under § 1983 has been determined to be frivolous, vexatious, unreasonable, or without foundation, even in the

absence of subjective bad faith on the plaintiff's part. *See Hensley* v. *Eckerhart*, 461 U.S. 424, 429, n. 2 (1983); *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978). "[N]eedless to say, if a plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense." *Christiansburg Garment Co.* v. *EEOC, supra*, 434 U.S. at 422 (emphasis original). Hence, the state policy expressed in the legislative declaration of COLO. REV. STAT. § 13-17-101, which is to relieve courts that have "become increasingly burdened with litigation which is straining the judicial system and interfering with the effective administration of civil justice" by providing for assessment of attorney fees against parties who bring actions that are groundless, frivolous, or vexatious, is fully consistent with the federal policy embodied in § 1988 to compensate prevailing defendants where the plaintiff's action has been found frivolous, vexatious, unreasonable, or without foundation. *See Christiansburg Garment Co.* v. *EEOC, supra; Western United Realty, Inc.* v. *Isaacs*, 679 P.2d 1063, 1065-1069 (Colo. 1984).

Here, the trial court made explicit findings that Petitioner's action was groundless and that his conduct in bringing and continuing it was vexatious. (Pet. App. 3a-4a, 24a-25a). For this reason, the application of COLO. REV. STAT. § 13-17-101 *et seq.* to Petitioner's action under § 1983 is not in any way "inconsistent" with § 1988, and thus the Colorado Court of Appeals did not err in holding that COLO. REV. STAT. § 13-17-102 applied to § 1983 actions brought in state court that lack substantial justification.

Furthermore, the Complaint asserted nine state law tort claims, which are fully subject to COLO. REV. STAT. § 13-17-102. Section 1988 does not apply to those claims. *See North Carolina Dept. of Transportation* v. *Crest Street Community Council, Inc.*, 479 U.S. 6, 11-15 (1986); *see also Brown* v. *City of Colorado Springs*, 749 P.2d 475, 477 (Colo. App. 1987).

II.

Petitioner raises a number of other issues, many for the first time here. Therefore, these issues have not been adequately preserved for review. In any event, these issues do not implicate either the jurisdiction of this Court or any ground for issuance of a writ of certiorari to the Colorado Court of Appeals.

A.

Petitioner's challenge to the constitutionality of COLO. REV. STAT. § 18-9-109 (1980) was not raised in the trial court; his challenge to the constitutionality of COLO. REV. STAT. § 13-17-101 *et seq.* (1987) and COLO. R. CIV. P. 11 was raised neither in the trial court nor in the Colorado Court of Appeals. Questioning the constitutionality of a statute for the first time on appeal in a state court will not successfully raise the issue for review by the Supreme Court. *See Board of Directors of Rotary International* v. *Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). Questioning the constitutionality of a state statute for the first time on petition for writ of certiorari also will not successfully raise the issue for review by this Court. *See Head* v. *New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 433, n. 12 (1963); *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973); *Monks* v. *New Jersey*, 398 U.S. 71, 72 (1970).

In any event, Petitioner's argument that COLO. REV. STAT. § 13-17-101 *et seq.* violates equal protection because it does not provide for an award of attorney fees to a *pro se* litigant is patently meritless. A *pro se* litigant who is not an attorney is not entitled to an award of attorney fees. *Kay* v. *Ehrler*, ____ U.S. ____, 111 S. Ct. 1435, 113 L. Ed. 2d 486 (1991). *See also Hittson* v. *Browne*, 3 Colo. 304, 309 (1877).

B.

Petitioner argues, in an indefinite way, that various actions of the trial court and/or the Colorado Court of Appeals violated his alleged rights to due process and/or equal protection. Most of these issues were not raised by Petitioner either in the trial court, in the Colorado Court of Appeals, in his Petition for Rehearing to the Colorado Court of Appeals, or in the Colorado Supreme Court, nor were they passed upon by any of these courts, and, therefore, these issues should not be considered on petition for writ of certiorari. *See Bankers Life & Casualty Co.* v. *Crenshaw, supra; Dewey* v. *Des Moines,* 173 U.S. 193, 198-200 (1899); *see also* SUP. CT. R. 14.1(h). In particular, the issue concerning the custom and practice of the Colorado Court of Appeals to deny oral argument to *pro se* litigants was never raised below, and Supreme Court review is therefore foreclosed. *See Tacon* v. *Arizona, supra; Head* v. *New Mexico Board of Examiners in Optometry, supra.*

Although Petitioner claims that these various orders have denied him "due process" and/or "equal protection", he does not expressly allege that such alleged denials were denials of the "due process" or "equal protection" guaranteed by the Fourteenth Amendment to the United States Constitution. A generic reference to "due process" or "equal protection" is not sufficient to preserve a *federal* claim, *see Bankers Life & Casualty Co.* v. *Crenshaw, supra,* particularly where the state constitution contains similar provisions guaranteeing due process and equal protection of the laws. *See* COLO. CONST. art. II, §§ 6, 25. Petitioner does not identify the federal constitution as the source of his alleged rights. Thus, even if Petitioner has preserved his constitutional challenge, it is unclear whether he has presented an issue of federal or state law. *See Webb* v. *Webb,* 451 U.S. 493, 495-501 (1981); *Bankers Life & Casualty Co.* v. *Crenshaw, supra.* For this reason, review should be denied.

C.

Finally, the remaining issues raised by Petitioner involve purely questions of state law, or else Petitioner's objections to the state court's application of state law, and should therefore not be considered on petition for writ of certiorari. *See International Longshoremen's Ass'n, AFL-CIO* v. *Davis,* 476 U.S. 380, 387 (1986); *Agins* v. *City of Tiburon,* 447 U.S. 255, 260, n. 6 (1980).

This is a case of a stubborn *pro se* litigant who does not understand judicial procedure and who refuses to abide by the judgments and orders rendered against him. The trial court found that Petitioner's claims were groundless, frivolous, vexatious, and brought in bad faith. The Colorado Court of Appeals found that Petitioner's appeal was prosecuted in a vexatious manner and was replete with arguments that have no support in law or the facts. His petition for a writ of certiorari to this Court is simply more of the same. Even if his issues were not patently meritless, he has failed to preserve them in the state courts below for review by this Court, and consequently there is nothing of substance for this Court to review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be DENIED.

Respectfully submitted,

JOHN ROGER MANN*
COOPER & KELLEY, P.C.
1660 Wynkoop Street,
Suite 900
Denver, Colorado 80202-1197
(303) 825-2700

Attorneys for Respondents

*Counsel of Record

Dated: November 4, 1991

(3)

No. 91-561

In the

Supreme Court of the United States

October Term, 1991

MAHINDER S. UBEROI,
Petitioner,

v.

UNIVERSITY OF COLORADO, a State Institution, WILLIAM McINERNY, JOE ROY, GARY ARAI, JOHN HOLLOWAY, and RICHARD THARP,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

PETITION'S REPLY TO BRIEF IN OPPOSITION

Mahinder S. Uberoi, pro se
819 Sixth Street
Boulder, Colorado 80302
(303) 442-2879

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

No. 91-561

In the

Supreme Court of the United States

October Term, 1991

MAHINDER S. UBEROI,
Petitioner,

v.

UNIVERSITY OF COLORADO, a State Institution, WILLIAM McINERNY, JOE ROY, GARY ARAI, JOHN HOLLOWAY, and RICHARD THARP,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Respondents' assertion, that except for one issue, petitioner has failed to preserve any other issue for review here, is unfounded

Respondents state that review of judgment and opinion of Court of Appeals involves two questions:

> 1. Whether the Colorado Court of Appeals correctly held that the University of Colorado and its officials acting in their official capacities are not "persons" subject to suit under 42 U.S.C. §1983 in affirming the judgment of the trial court after this Court's intervening decision in Will v. Michigan Department of State police, 491 U.S. 58 (1989)?
>
> 2. Whether Petitioner has adequately preserved any of his other issues for Supreme Court review?

Colorado Court of Appeals did not affirm because petitioner had failed to preserve some issues, but solely because

> [Will], in essence, validated the trial court's original conclusion that subject matter jurisdiction was lacking. Therefore, we agree with defendants that plaintiff's remaining claims are barred. [Emphasis added. Petition at a3, a4.]

Thus, without any analysis, the court held that Will barred 42 U.S.C. §1983 claims for damages against respondents in their official capacities as well as claims for injunctive relief as well as §1983 claims against respondents in their personal capacities, as well as a common law claim of assault and battery against McInerny, which was revived. See petition at 6 and 7 about revival of the common law claim.

Petitioner's reply to respondents' detailed assertions of petitioner's failure to preserve issues is given in the last part of this brief.

Respondents' arguments do not support Court of Appeals conclusory opinion

Is University of Colorado a "local governing body" or an "arm of the state"

for purposes of Eleventh Amendment Immunity relative to §1983 claims

Respondents argue that,

> In any event, if Colorado Supreme Court determined [Uberoi v. University of Colorado, 713 P.2d 894 (Colo. 1986)] that a state university, chartered by the state constitution, is a "local governing body" subject to suit under §1983, then it was in error...
>
> The test whether a governmental entity is an arm of the state, as distinguished from so-called political subdivision such as counties, municipalities, and other "local governing bodies," are: (1) to what extent does the entity, although carrying out a state mission, function with substantial autonomy from the state government, and (2) to what extent is the entity financed independent of the state treasury. See Unified School District No. 480 v. Epperson, 583 F.2d 1118, 1121-1122 (10th Cir. 1978) [Opposition Brief at 13,14.]

Thus, petitioner and respondents agree on the criteria, see petition at 17, to determine whether University of

Colorado may be considered a "local governing body" and a "person" under §1983 and subject to damage suit following Monell v. Dept. of Social Services of City of New York, 436 U.S. 658 (1978). However, opposing sides come to opposite conclusions.

Respondents argue that:

> State universities are generally subject to complete control of and are financed by the state. [Emphasis added. Opposition Brief at 14.]

However, each state university operates under its own peculiar circumstance, state policy and law. Therefore, citations of cases involving other state universities is unavailing here.

Opposition Brief at 16 then cites opinions of various courts on University

of Colorado. In re Macky's Estate, 102 P. 1075, 1081 (Colo. 1909) held that "[Board of Regents] is an agency of the state for the governance of the University [of Colorado]." The court summarized the case as:

> Proceeding for the assessment of an inheritance tax on the estate of Andrew J. Macky, deceased. From an order of the county court declaring certain legacies to the Regents of the State University and to the City and County of Boulder not subject to the tax, reversed on appeal to the district court, the legatees appeal. Reversed and remanded, with direction to enter judgment that the legacies are not subject to tax. Id. at 1075.

The court lumped the University of Colorado with City and County of Boulder and held that as subdivisions of the state they are not subject to state inheritance tax. It did not decide on the extent of control exercised by the

state on City and County of Boulder and the University, both of which are chartered by the state.

Opposition Brief at 16 further cites Rozek v. Topolnicki, 865 F.2d 1154, 1158, (10th Cir. 1989) which held that

> The district court did not err in concluding that...the University of Colorado [is] entitled to Eleventh Amendment Immunity in this case.

Respondents also cite some unpublished opinions of the district court dated 1982, 1983, and 1984. None of these conclusory opinions gives any analysis under the criteria proposed by respondents. All of these opinions were issued before 1990 when Colorado Legislature amended C.R.S. §23-1-104(3), effective July 1, 1990, which frees the

governing boards of all state supported institutions of higher learning, including University of Colorado, from all state control.

> C.R.S. §23-1-104(3). Notwithstanding the provisions of §24-75-102, C.R.S., the governing bodies are authorized to retain all moneys appropriated pursuant to this section and §23-1-118 or otherwise generated, fiscal year to fiscal year.

Moreover under §23-1-104(1)(a) the University gets from the state "annual appropriations as a single line item" which it may use in "manner deemed most appropriate" by it. In 1988-89 only 22.9% of its revenues came from the state treasury. Petition at 19.

Opposition Brief at 15 states:

> Under Colo. Const. Art. VIII, §5, this body corporate [University of Colorado] is under the control of General Assembly.

Section 5(2) states:

> The governing boards of the state institutions of higher education, whether established by this constitution or by law, shall have the general supervision of them respective institutions and exclusive control and direction of funds and appropriations to their respective institutions, unless otherwise provided by law. [Emphasis added.]

The constitution was amended in 1972, effective January 11, 1973 to add "Unless otherwise provided by law" because the University claimed that general laws do not apply to it because of its special status under the constitution. Even so, it prevailed that Colorado Open Meetings does not apply it, Associated Students of University of Colorado v. Regents of University of Colorado, 543 P.2d 59 (Colo. 1975) and that Open Records Act

does not apply it, Uberoi v. University of Colorado, 686 P.2d 785 (Colo. 1984). It claimed that reference to "institution" in definition of "public records" is not specific enough to demonstrate legislative intent to make open records law applicable to the University of Colorado. Even though Art. VIII of Colo. Const. governing the University of Colorado is entitled "State Institutions."

Thus, the courts have held the University of Colorado enjoys substantial independence from the state. In order to show that State Supreme Court was in error in Uberoi, 1986, and that the University is not a "local governing body" under Monell, supra, it is necessary to analyze the actual

operation of the University in the light of criteria set by federal law and proposed here by respondents. This cannot be done by mentioning the University of Colorado in footnote 3 in Will, supra, nor by a conclusory opinion of Colorado Court of Appeals.

The Appeals Court should have remanded the case to trial court to take evidence on the operations of the University, including its financial records to show the percentage of state support and historical record and the recent state law on the extent of state control over the University.

The Appeals Court did not ask to be rebriefed by the parties in the light of Will. It did not even ask for a short supplemental brief after respondent

brought Will to its attention. It simply issued a conclusory opinion.

Opposition Brief at 15 states:

> The Board is represented in law suits by the Attorney General of the State of Colo., see Colo. Rev. Stat. §23-20-110 (1988), and no claim against the University may be settled without the Attorney General's consent. See Colo. Rev. Stat. §24-10-112 (1989).

The Attorney General has discharged his duty under the statutes by designating counsel employed full time by the University as Special Assistant Attorney General and the University is quite independent otherwise. In fact, the University is not represented by the Attorney General, nor by his staff paid from the state fund, nor by any Special Assistant Attorney General.

Petitioner's claim for injunctive relief

Opposition Brief at 17 states:

> Nor do Respondents dispute a suit for injunctive relief may be maintained against a state official in his official capacity under §1983...
>
> Although petitioner attempted to amend his complaint to seek injunctive relief, leave to amend was neither sought nor granted by trial court. Failure to preserve this issue below precludes its consideration by this Court.

The record on appeal, Vol. I, p. 27, and again at p. 47, shows that on August 15, 1983, petitioner filed motion to amend the complaint by interlineation, and Vol. I pp. 28, 29 show the amendment by interlineation to the complaint which seeks injunctive relief.

Claims against respondents in their personal capacities

Opposition Brief at 17 states:

> Respondents do not deny that the Court's decision in Will concerned only suits against state officials in their official capacities, and that suits under §1983 may still be maintained against State Officials in personal capacities. See Kentucky v. Graham, 473 U.S. 159(1985).
>
> The record shows that this issue [of personal capacity claims] was never raised by petitioner in his petition for rehearing in Colorado Court of Appeals, or in his petition for writ of certiorari in the Colorado Supreme Court. Hence, this issue has not been preserved for Supreme Court review. Id. at 18.

In the Colorado Court of Appeals, petitioner sought statutory review of trial court judgment. The Court of Appeals affirmed summary judgment for all defendants on all claims, including personal capacity claims because under Will trial court has no subject matter jurisdiction of any claim. Petition for

rehearing stated that Will concerned only claims against some respondents in their official capacities. The petition repeatedly stated that the court considers the issues raised on appeal which are not barred by Will.

> This court has refused to rule on several meritorious issues raised on appeal... . [Petition for rehearing in Colorado Ct. of Appeals at 1.]
>
> The court should grant rehearing on its judgment...and rule on the issues raised on appeal. Id at 6.

Moreover, the petition sets forth in detail that the court should conduct statutory review of trial court's dispositions of personal capacity §1983 suit against respondent McInerny.

> Trial court dismissed slander, assault and battery claims against McInerny for Uberoi's failure to give notice under [Colorado] Governmental Immunity Act. Supreme

> Court affirmed. On remand, trial court ruled that it was a "fight between two private citizens," V.2, p. 248 [petition at a10] and granted summary judgment for McInerny on [§1983] civil rights claims. Thus trial court reacquired jurisdiction over the common law claims of assault and battery since McInerny, acting as a private citizen, the protection of Governmental Immunity. Id. 1,2.

In the petition for writ of certiorari in Colo. Supreme Court, petitioner sought review of Colorado Court of Appeals' failure to conduct statutory review of trial court's disposition of §1983 personal capacity claims. However, petitioner is not seeking review of proceedings in the state supreme court and respondents' arguments about these proceedings are irrelevant here.

Federal law governs attorney fees for §1983 claims in state court

Opposition Brief at 19 states:

> Petitioner asserts that Colo. Rev. Stat. §13-17-101 does not apply to awards of attorney fees for... litigation under §1983. Once again this issue was neither passed on by Colorado Court of Appeals nor raised in his petition for rehearing in that court of in his petition for writ of certiorari to the Colorado Supreme Court.

Petitioner raised this issue in Colorado Court of Appeals which resolved this and all other issues with the conclusory opinion that Will, supra, deprived trial court of subject matter jurisdiction of all claims.,

Constitutionality of some state statutes

Opposition Brief at 21 states:

> Petitioner's challenge to the constitutionality of Colo. Rev. Stat. §18-9-109(1980) was not raised in the trial court; his challenge to the constitutionality of Colo. Rev. Stat. §13-17-101 et seq. (1987) and Colo. Rev. Civ. P. 11 was raised neither in the trial

court nor in the Colorado Court of Appeals.

The record on appeal, Vol. II, pp. 318, 319, and 325 shows that the constitutionality of §18-9-109(1980) was raised in the trial court; Vol. III, p. 402, shows that the constitutionality of §13-17-101 et seq., and Colo. R. Civ. P. 11 was raised in the trial court. The list of issues raised and the body of petitioner's brief in Colorado Court of Appeals show that these issues were raised there and/or are encompassed in the issues raised there.

Conclusion

In light of inability of respondents to face the issues presented in the petition without grossly distorting the record below, the need

for plenary review of the action below is indisputable; indeed, petitioner suggests that summary reversal is now in order.

Respectfully submitted,

By Mahinder S. Uberoi
petitioner, pro se

No. 91-561

In the

Supreme Court of the United States

October Term, 1991

MAHINDER S. UBEROI,
Petitioner,

v.

UNIVERSITY OF COLORADO, a State Institution, WILLIAM McINERNY, JOE ROY, GARY ARAI, JOHN HOLLOWAY, and RICHARD THARP,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

PETITIONER'S SUPPLEMENTAL BRIEF

Mahinder S. Uberoi, pro se
819 Sixth Street
Boulder, Colorado 80302
(303) 442-2879

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

No. 91-561

In the

Supreme Court of the United States

October Term, 1991

MAHINDER S. UBEROI,
Petitioner,

v.

UNIVERSITY OF COLORADO, a State Institution, WILLIAM McINERNY, JOE ROY, GARY ARAI, JOHN HOLLOWAY, and RICHARD THARP,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

PETITIONER'S SUPPLEMENTAL BRIEF

Hafer v. Melo, No. 90-681 decided by this Court on November 5, 1991, is crucial to petitioner's case. The slip opinion in Hafer at 11 states:

> Summarizing our holding [in Will v. Michigan Department of State Police, 491 U.S. 58 (1989)], we said: "Neither a State nor its officials acting in their official capacities are 'persons' under §1983." Ibid. Hafer relies on this recapitulation for the proposition that she may not be held personally liable under §1983 for discharging respondents because she "acted" in her official capacity as Auditor General of Pennsylvania. Of course, the claims considered in Will were official-capacity claims; the phrase "acting in their official capacities" is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury. To the extent that Will allows the construction Hafer suggests, however, we now eliminate that ambiguity.

Relying on this ambiguity, Colorado Court of Appeals erroneously affirmed summary judgment for respondents on personal-capacity 42 U.S.C. §1983 claims. Petition at a3, a4.

Petitioner brought §1983 claims against University of Colorado, its officials and police officers. State district court dismissed claims against all respondents for lack of subject matter jurisdiction because the University is not a "person" under §1983. The dismissal of personal-capacity §1983 claims against individual respondents was clearly erroneous since these claims are not affected by the University's status under §1983.

Colorado Supreme Court in Uberoi v. University of Colorado, 713 P.2d 894 (Colo. 1986) held that the University is sufficiently independent of the state to be considered a local governing body and therefore a "person" under §1983, following Monell v. Department of Social

Services of City of New York, 436 U.S. 658 (1978). It reinstated §1983 claims against the University and all individual respondents.

Having determined that the University is a "person" under §1983, it was not necessary for the court to state that personal-capacity suits against individual respondents would be reinstated, regardless of the University's status under §1983.

On remand, trial court granted summary judgment for all respondents because their conduct did not rise to the level of constitutional deprivations. Colorado Court of Appeals ruled that:

> While this appeal was pending the United States Supreme Court ruled, in Will v. Michigan Department of

> State Police, 491 U.S. 58 (1989), that states, governmental entities that are "arms of the state" and state officials acting in their official capacity are not "persons" within the meaning of 42 U.S.C. §1983. [Emphasis added, petition at a3.]
>
> Accordingly, although the trial court provided different reasons for its second dismissal of the complaint, we affirm the dismissal on the ground that it lacked subject matter jurisdiction. [Petition at a4.]

As far as the dismissal of personal-capacity §1983 claims against respondents is concerned, Colorado Court of Appeals' affirmance based on Will is clearly erroneous in view of this court's holding in the last paragraph of Hafer:

> We hold that state officials, sued in their individual capacities, are "persons" within the meaning of §1983. The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from

personal liability under §1983 solely by virtue of the "official" nature of their acts.

CONCLUSION

For this additional and crucial reason of the holding in Hafer, the petition should be granted.

Respectfully submitted,

By Mahinder S. Uberoi

MAHINDER S. UBEROI, pro se
819 Sixth Street
Boulder, Colorado 80302